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### ABSORPTION OF ONE CORPORATION BY ANOTHER AS AFFECTING THE LIABILITIES OF THE ABSORBED CORPORATION.

No question is of greater importance in this day of corporate merger and inter-merger, than the liability of corporations or mergers for the liabilities of corporations absorbed by them. On this point, therefore, the recent case of *Camden Interstate Ry. Co. v. Lee*, 84 S. W. Rep. 322, will be of interest to the profession. In this particular case the Kentucky Court of Appeals held that where one controlling the stock of a street railroad company purchased a large amount of its stock at 50 or 60 cents on the dollar, and contracted with the remaining stockholders to issue for their stock that of another corporation, after conveyance by the street railroad company of all its property and franchises to the other corporation, the latter was responsible for the existing liabilities of the street railroad company, and could not deny such liability because the street railroad company was insolvent at the time of the conveyance.

In this case it appeared that plaintiff obtained a judgment against the Ashland & Catlettsburg Street Railway Co. This latter company was later sold to the Camden Interstate Railway Co., for one dollar, the stockholders in the former company having already exchanged their stock for stock in the latter company. The latter company then refused to pay the liabilities of the former company on the ground that when they purchased the property of the latter company, the said company was insolvent. In answer to this argument the court said: "It is insisted that the judgment against the Camden Interstate Railway Company is wrong, because the Ashland & Catlettsburg Street Railway Company was in fact insolvent when the transfer was made, and must have failed but for the new arrangement. We do not think this is a material inquiry. Camden paid for all the stock which he bought in the street railway company 50 or 60 cents on the dollar, and for the stock which he did not buy he issued stock in the interstate railway company,

share for share. The sum of the transaction was that Camden either owned in his own right all the stock of the street railway company, by way of purchase, or controlled it under contracts by which the stockholders agreed to take stock in the new company for the stock which they held in the old; and, while he thus controlled all the stock in the street railway company, he caused that company to deed all of its property and franchises to the Camden Interstate Railway Company, and thus the stockholders in the street railway company became stockholders in the interstate railway company. In this way the stockholders in the street railway company put all of their property and franchises in the hands of the interstate railway company, and became stockholders in that company in lieu of the street railway company. By this means the interstate railway company swallowed up or absorbed the street railway company.

On the question as to whether a corporation by a method similar to that adopted in this case, may change its name and shift its liabilities, the court said: "While there was no stipulation in the deed that the new company should answer for the liabilities of the old, the law will not allow the stockholders in a corporation thus to change the name in which their property is held, and defeat the claims of creditors. The rule is that where one corporation goes entirely out of existence, by being merged into another, the liabilities of the old corporation are enforceable against the new one, just as if no change had been made. *Thompson on Corporations*, § 372; 6 *Am. & Eng. Ency. of Law*, 818; 10 *Cyc.* 306, 314. It is held by some authorities that one corporation cannot become a permanent shareholder in another unless the right is conferred by statute, and therefore the more usual form of merging one corporation with another is for the new corporation to issue its own shares to the stockholders of the old company in exchange for their stock in that company. For this reason the agreements with the stockholders of the old company were all made in the name of Camden, and the agreement was carried out in his name; he being apparently the owner of the controlling interest in the new company. But the law will not look merely at the form of the transaction. It looks through the form to the substance of it. The sum of it here was that Camden,

controlling the stock of the old company, transferred its property to the new, and issued the stock in the new to take the place of that in the old company. This was not a purchase of the stock of the old company. It was simply an absorption of the old company into the new, and the new became answerable for all the liabilities of the old company which it absorbed, and will not be heard now to say that the assets of that company were worthless, or that the stock, which was selling at 50 or 60 cents on the dollar, was of no value."

#### NOTES OF IMPORTANT DECISIONS.

**LOTTERIES—WHETHER A "SUIT CLUB" CONSTITUTES A LOTTERY.**—The Supreme Court of Georgia holds in a recent case that a "suit club" whose members pay to a tailor \$1.00 per week, and which holds weekly drawings as a result of which the member holding the lucky number receives from the tailor a suit of clothes, and then ceases to be a member of the club, is a scheme in the nature of a lottery. *De Florin v. State*, 49 S. E. Rep. 699. The court held that the decision was not affected by the fact that an unlucky member, who continued to pay his \$1.00 weekly for thirty weeks would be entitled to a \$30 suit of clothes regardless of the result of the drawings. The court expressed itself in the case as follows:

"The sole question presented for our decision is whether, under the facts stated below, the accused was guilty of the offense of carrying on a lottery. *De Florin* operated what was known as a "suit club." The plan of the club was as follows: Thirty men paid \$1 each to *De Florin*, who was a tailor, and received cards bearing numbers from 1 to 30. Once a week slips of paper bearing numbers corresponding to those on the cards of the members were placed in a box, and some disinterested person drew therefrom one slip. The member who held the lucky number was then entitled to a suit of clothes made by *De Florin*, worth \$30. This member then dropped out of the club, and his place was supplied by some one else. If a member paid \$1 a week for 30 weeks he was entitled to a suit whether he drew the lucky number or not. We do not hesitate to hold that this scheme constituted a lottery. We do not deem it necessary to go into a full discussion of the law on this subject, for in the case of *Meyer v. State*, 112 Ga. 20, 37 S. E. Rep. 96, 51 L. R. A. 496, 81 Am. St. Rep. 17, Mr. Justice Cobb has given such an exhaustive review of the decisions of this and other courts in regard to lottery devices that nothing can be added thereto. We will merely quote from the opinion of *Robertson, J.*, in *Shumate's Case*, 15 Grat. 654, which is quoted with approval in the *Meyer Case*, as covering the only point in the case at bar about

which there can be the slightest doubt: 'It is true that a bet does imply risk, but it does not necessarily imply risk in both parties. There must be between them a chance of gain and a chance of loss; but it does not follow that each of the parties to the bet must have both these chances. If, from the terms of the engagement, one of the parties may gain, but cannot lose, and the other may lose but cannot gain, and there must be either a gain by the one or a loss by the other, according to the happening of the contingency, it is as much a bet or wager as if the parties had shared equally the chances of gain and of loss.' So, in the present case, the fact that a member who was unlucky in the drawing of prizes might, by continuing to pay \$1 a week for 30 weeks, receive a suit of clothes regardless of the result of the drawings, does not make the transaction any the less a lottery, for the lucky members of the club won prizes varying in value from \$1 to \$29."

This decision is important as showing the tendency of the cases to enlarge the scope of the meaning of the term "lottery" to include those schemes by which, while everyone receives a fair compensation for his contribution to the general fund, some people are specially favored. Heretofore, it has been generally considered to be a redeeming feature in any scheme supposed to be a lottery that no one would lose anything and that everyone taking part would be compensated to some extent.

**WITNESSES—COMPETENCY OF WITNESS UNDER NINE YEARS OF AGE WHERE THE LAW EXEMPTS SUCH PERSONS FROM LIABILITY FOR CRIMES COMMITTED.**—A very interesting question arose in the recent case of *Freasier v. State*, 84 S. W. Rep. 360. In that case it appeared that the constitution of Texas, as other constitutions, provides that all oaths shall be taken subject to the pains and penalties of perjury. By a provision of the criminal code of that state it is provided that no person shall in any case be convicted of an offense committed before he was nine years old. In view of these provisions of the law, the court of Criminal Appeals of Texas was constrained, against its better judgment, to hold that a person under nine years of age cannot be a witness in a case involving life or liberty. The argument of the court on this interesting question is not without value. The court said:

"Did the witness take said oath, as required by the constitution (article 1, § 5), under the pains and penalties of perjury? That portion of the constitution reads as follows: 'All oaths or affirmations shall be administered in the mode most binding upon the conscience, and shall be taken subject to the pains and penalties of perjury.' Evidently this language means that if a witness, having taken an oath to testify, shall give any false testimony upon a material issue, on conviction such witness shall be guilty of perjury, and punished therefor. However, the legis-

lature has provided (Pen. Code 1895, art. 34), 'No person shall in any case be convicted of any offense committed before he was of the age of nine years.' As it is competent for the legislature to define offenses and prescribe punishment therefor, or to exempt from punishment, it would follow, inasmuch as there is no law subjecting persons under nine years of age to any punishment for perjury, that an oath taken by a witness under that age is not taken subject to the pains and penalties of perjury, as is required by the constitution. Unquestionably, the constitution must be the rule of action governing matters of this character, and it follows that, if a person cannot be punished for perjury, who takes an oath as a witness, such an oath is not binding, and such person cannot be a witness in a case involving life or liberty; and a conviction based in whole or in part upon the testimony of such a witness cannot be sustained. We would remark in this connection that, if there is a statutory provision requiring an oath to be administered to a witness in a criminal case, it has escaped our attention. In the absence of such provision, we would be relegated to the rule at common law (article 763, Wilson's Code Cr. Proc.), which requires oaths to be taken by witnesses. Indeed, our whole system of procedure appears to be based on the idea that in all criminal prosecutions witnesses are required to give their evidence under oath. As seen, under our constitution, that oath, to be binding, must be taken under the pains and penalties of perjury. This matter was referred to in *Reys v. State*, 76 S. W. Rep. 457, 8 Tex. Ct. Rep. 339, and the possible hiatus pointed out. But the question was not before the court in that case. And see *Kenney v. State*, 79 S. W. Rep. 817, 9 Tex. Ct. Rep. 893, 65 L. R. A. 316; particularly on this point the dissenting opinion of Judge Davidson. Here the question is directly involved. We hold that the prosecution cannot be maintained on the testimony of a witness under nine years of age, on the ground that such a witness cannot be punished for perjury."

The court in the closing statement of its opinion volunteers the following recommendation to the legislature in regard to this matter: "We respectfully call the attention of the legislature to this condition, as it may follow in many cases, especially injuries committed on children of tender years, that the guilty party may escape punishment, however intelligent the witness may be, and however capable of understanding the nature and obligation of an oath, simply because such a witness does not testify under the pains and penalties of perjury, which is required by our constitution."

**JUDICIAL SALES—LIABILITY OF BIDDER FOR REFUSAL TO PERFORM.**—The liability of a bidder at a judicial sale depends on the confirmation of this sale at which the bid is made and where there is no confirmation there is no liability. This rule is clearly and forcibly illustrated in the recent case of *Cowper v. Weaver's Adm'r*, 84 S. W.

Rep. 323, where the Supreme Court of Kentucky held that where the commissioner treats a bid at a judicial sale as a nullity, for refusal of the bidder to take the property, and resells the property—the last sale being confirmed by the court without objection—it is then too late to proceed against the first bidder for the difference between his bid and the amount received on the resale. The court expressed its views on the question in the following language:

"The commissioner, in making the sale, is the agent of the court. His powers are limited by the orders of the court. He has no power to treat a sale as a nullity, and in the case cited the judgment of the court turned not on the action of the commissioner, but on the order of the court confirming the action of the commissioner, for the act of the agent amounted to nothing until it was ratified by the court. The commissioner is simply ordered to sell the property. He is without power to release the purchaser from his obligation. The liability of the purchaser depends upon the action of the court. In the case, at bar the court ordered the sale to be treated as a nullity. He directed the land to be resold, and, when that sale was made, he confirmed it, and directed the property to be conveyed to the purchaser. The purchaser at the first sale was only a preferred bidder until his bid was accepted by the court by confirming the sale. The contract was not complete, and, when the court decided not to confirm the sale, but to treat it as though it had not been made, the purchaser stood simply as any other person who makes a proposition which is not accepted. When the purchaser fails to execute his bond, it may be that the parties prefer another sale, thinking that the property will sell for more, and in this event the court may so order without taking any proceedings against the purchaser. But if it is desired to hold the purchaser, then his bid must be accepted by the court and, if he still refuses to give the bond, a resale may be ordered, or the purchaser may be dealt with as in cases of contempt; and, in this state of case, if the land on the second sale sells for more than on the first, the surplus will belong to the purchaser. The court cannot, however, treat the sale as a nullity, and thus keep the surplus, if the land on the second sale sells for more than on the first, and at the same time hold the purchaser responsible for the deficiency if on the second sale it sells for less."

In an earlier decision by the same court it appeared that the commissioner sold a tract of land, and the purchaser failing to execute bond, re-advertised the property, and made a second sale at the next county court. He then reported to the court both the sales. The court confirmed the second sale and ordered the property conveyed to the purchaser. After this a rule was taken out against the purchaser at the first sale to show cause why he should not pay the deficiency. It was held that he was not liable. *Makemson v.*

Brann, 18 Ky. Law Rep. 584, 37 S. W. Rep. 495. The court said in this case: "While an accepted bidder at a judicial sale who fails to comply with his bid may, by proper proceedings, be required to pay the damage resulting from such failure, which would include the difference between the bid, if any, and the amount realized on the final sale, if the property sold for less on that sale than at the former sale, yet, where the commissioner has elected to treat the bid as a nullity, and has proceeded to advertise and resell the property, and the second sale has been confirmed without objection, it is then too late to proceed against the first purchaser for failure to comply with the terms of the sale."

#### MUNICIPAL LIABILITY FOR INJURIES RESULTING FROM DEFECTIVE AND INADEQUATE SEWERAGE.

*Scope.*—This paper will have to do only with the liability of a municipal corporation for injuries to property, produced by flowage, as a result of an imperfect or inadequate system of sewerage, or obstructions therein; and injuries to persons produced by noxious and poisonous gases, resulting from the like causes.

*Dual Capacity of Corporation.*—There are certain powers and functions of a municipal corporation, forming a very well defined class, which are performed by it in its public capacity, partaking of either a legislative or a judicial character; and others, forming a class equally well defined, which are performed by the municipality in its private capacity, and being of a merely ministerial nature. As to the former, with certain limitations in some jurisdictions, the corporation enjoys absolute immunity from liability to parties injured in their persons or property; as to the latter, full liability attaches. With this statement of the dual character of a municipal corporation, we shall proceed to examine the application of the law by the courts to the particular subject of this paper.

*Nonliability for Failure to Establish System of Sewerage.*—In most, if not in all, of the states a municipal corporation is given the power, plenary and exclusive, to construct and maintain a system of municipal sewerage. But there is generally no duty imposed by the statute to execute this power, it being one confided to the discretion of the municipal authorities. For a failure of its exercise,

therefore, resulting in injury to a party, there is no liability.<sup>1</sup>

Surface water is a common enemy, and one whose lot or land is below grade cannot complain that the city does not take care of it for him. It is his own right and duty to shed off such water, and not the duty of the city.<sup>2</sup> The liability of the corporation in such a case begins only when it assumes to exercise one of the powers delegated to it by the legislature, and does so negligently.<sup>3</sup>

*Inadequate Sewerage.*—There being, then, no duty to undertake the establishing of a system of sewerage, logically it follows that no liability would attach for the construction of an inadequate or insufficient system. And this the courts universally hold. Whether such an improvement is expedient, as well as the character and extent of the improvement, is a matter of a public nature to be determined by the city in its legislative capacity, or by one of its boards in the exercise of its quasi-judicial power.<sup>4</sup> The rule, with the reason for it, was thus stated by Denio, C. J., in the leading case of *Mills v. City of Brooklyn*:<sup>5</sup> "It is not the law that a municipal corporation is responsible in a private action for not providing sufficient sewerage for every, or for any, part of the city or village. The duty of draining the streets and avenues

<sup>1</sup> *Cooper v. City of Scranton*, 21 Pa. Super. Ct. 17; *Mills v. City of Brooklyn*, 32 N. Y. 489; *Thoman v. City of Covington*, 23 Ky. Law Rep. 117, 62 S. W. Rep. 721; *City of Hamilton v. Ashbrook*, 62 Ohio St. 511, 57 N. E. Rep. 239; *City of Chattanooga v. Reed*, 103 Tenn. 616, 53 S. W. Rep. 937.

<sup>2</sup> *Aicher v. City of Denver* (Col. App.), 52 Pac. Rep. 86; *Jordan v. City of Benwood*, 42 W. Va. 312, 26 S. E. Rep. 266, 36 L. R. A. 519; *Stanford v. San Francisco*, 111 Cal. 198; *Parker v. City of Laredo*, 9 Tex. Civ. App. 221.

<sup>3</sup> *City of Chicago v. Rustin*, 99 Ill. App. 47.

<sup>4</sup> *City of Louisville v. Norris*, 23 Ky. Law Rep. 1195, 64 S. W. Rep. 958; *Harrigan v. City of Wilmington*, 8 Houston, 140; *Cooper v. City of Scranton*, 21 Pa. Super. Ct. 17; *Mills v. City of Brooklyn*, 32 N. Y. 489; *Thoman v. City of Covington*, 23 Ky. Law Rep. 117, 62 S. W. Rep. 721; *Urquhart v. City of Ogdensburg*, 91 N. Y. 67; *Duryea v. Mayor, etc.*, 2 Hun, 299; *Carr v. North Liberties*, 35 Pa. St. 324; *Johnson v. District of Columbia*, 118 U. S. 19, 6 Sup. Ct. Rep. 923; *Pressman v. Borough of Dickson City*, 13 Pa. Super. Ct. 336; *Bealafeld v. Borough of Verona*, 188 Pa. St. 627, 41 Atl. Rep. 651; *Ostrander v. City of Lansing*, 111 Mich. 693; *Aicher v. City of Denver*, 10 Colo. App. 413; *Peck v. Michigan City*, 149 Ind. 670; *Knotsman, etc., Co. v. City of Davenport*, 99 Iowa, 589, 68 N. W. Rep. 887; *Darling v. City of Bangor*, 68 Me. 108; *Henderson v. City of Minneapolis*, 32 Minn. 319, 20 N. W. Rep. 322.

<sup>5</sup> 32 N. Y. 489.

of a city or village is one requiring the exercise of deliberation, judgment and discretion. It cannot in the nature of things be so executed that in every single moment every square foot of the surface shall be perfectly protected against the consequence of water falling from the clouds upon it. This duty is not in a technical sense a judicial one, for it does not concern the administration of justice between citizens; but it is of a judicial nature, for it requires, as I have said, the same qualities of deliberation and judgment. It admits of a choice of means and the determination of the order of time in which improvements shall be made. It involves also a number of prudential considerations relating to the burdens which may be discreetly imposed at a given time, and the preference which one locality may claim over another. If the owner of property may prosecute the corporation on the ground that sufficient sewerage has not been provided for his premises, all these questions must be determined by a jury, and thus the judgment which the law has committed to the city council, or to an administrative board, will have to be exercised by the judicial tribunals. The court and jury would have to act upon a partial view of the question, for it would be impossible that all the varied considerations, which might bear upon it, could be brought to their attention in the course of a single trial."

*Nonliability for General Plan of Sewerage.*

—It is the rule in general that a municipal corporation is not liable for any error of judgment on the part of its proper officers in deciding upon a particular plan of sewerage, resulting in consequential damage to any person.<sup>6</sup> In some cases, however, it is said that the corporation must in good faith plan its sewerage, to avoid liability for injury resulting from a defective plan; and that the plan adopted is required to be one reasonably suitable for the purposes intended to be accomplished.<sup>7</sup> But it is always presumed that the

municipal officers acted in good faith.<sup>8</sup> In some cases a distinction has been made between an error of judgment in devising a plan of public improvement, and negligence in that regard, the rule announced being that for its negligence even in devising the plan of improvement the city is liable.<sup>9</sup> In *City of North Vernon v. Vogler*, the court after announcing the rule just stated says: "The doctrine is not only sustained by authority, but is sound in principle. Suppose," said the court, by way of illustration, "that a common council of a city determine to build a sewer and cover it with reeds, can it be possible that the corporation can escape liability on the ground that the common council erred in devising a plan? Or, to take such a case as *City v. Huffer*, suppose the common council undertake to conduct a large volume of water through a culvert capable of carrying less than one-tenth of the water conducted to it by the drains constructed by the city, can responsibility be evaded on the ground of an error of judgment? Again, to take an illustration from a somewhat different class of cases, suppose the common council to devise a plan for a bridge that will require timbers so light as to give way beneath the tread of a child, can the city escape liability on the ground that there was an error of judgment in devising the plan? \* \* \* The only rule that has any valid support in principle," concludes the court, "is that for errors in judgment in devising a plan there is no liability, but there is liability where the lack of care and skill in devising the plan is so great as to constitute negligence." It has also been held that when a city assumes, at the expense of property owners intended to be benefitted thereby, to construct a sewer to drain a designated district, it must exercise due care to accomplish the purpose intended, and for injury resulting from the negligence of the city in this regard it will be liable in damages.<sup>10</sup>

This discretionary or judicial power does not extend to permit the conducting of surface waters in a body in an artificial channel,

<sup>6</sup> *Groves v. Olean*, 72 N. Y. Supp. 799, 64 App. Div. 598.

<sup>9</sup> *City of North Vernon v. Vogler*, 103 Ind. 314, 2 N. E. Rep. 821; *City of Crawfordsville v. Bond*, 96 Ind. 236; *City of Evansville v. Decker*, 84 Ind. 325; *City of Indianapolis v. Huffer*, 30 Ind. 235.

<sup>10</sup> *City of Litchfield v. Southworth*, 67 Ill. App. 398.

<sup>6</sup> *Harrigan v. City of Wilmington*, 8 Houston, 140 12 Atl. Rep. 779; *City of Louisville v. Norris*, 23 Ky. Law Rep. 1195, 64 S. W. Rep. 958; *Graves v. City of Olean*, 72 N. Y. Supp. 799, 64 App. Div. 598; *Pressman v. Borough of Dickson City*, 13 Pa. Super. Ct. 336; *Willett v. Village of St. Albans*, 69 Vt. 330, 38 Atl. Rep. 72; *King v. Kansas City*, 58 Kan. 334, 49 Pac. Rep. 88; *Winn v. Rutland*, 52 Vt. 481.

<sup>7</sup> *Hitchins v. Mayor, etc., of Frostburg*, 68 Md. 100, 11 Atl. Rep. 826. See *Gould v. City of Topeka*, 32 Kan. 485, 4 Pac. Rep. 827; *King v. City of Kansas City*, 58 Kan. 334, 49 Pac. Rep. 88.

or in a greater quantity, upon one's lands as backwater than before such construction.<sup>11</sup> As was said in the case of *Seaman v. City of Marshall*, *upra*: "There is no doubt of the authority of the city to establish a system of drainage for the benefit of the highway and the citizens, and it cannot be said that it must be sufficient for every possible emergency. But the city is required to use due caution, and if, through its negligence in not providing reasonably efficacious means to take care of the water that it should reasonably expect to accumulate by reason of its gutters, a person is injured by the overflow upon his premises of water collected by the sewers and brought to such premises, and which would not otherwise have invaded them, the city is liable for the damages." Nor does it authorize the pollution of a stream by casting sewage into it, to the damage of riparian owners,<sup>12</sup> or otherwise creating a nuisance.<sup>13</sup> And merely that riparian owners acquiesce in the construction of a sewer will not estop them from complaining of the pollution of the stream into which the sewer empties, as a nuisance.<sup>14</sup> "The great weight of authority," said the Wisconsin court, in *Winchell v. City of Waukesha*,<sup>15</sup> "American and English, supports the view that legislative authority to

install a sewer system carries no implication of authority to create or maintain a nuisance, and that it matters not whether such nuisance results from negligence or from the plans adopted. If such nuisance be created, the same remedies may be invoked as if the perpetrator were an individual." Authority is not lacking, however, to the effect that, where there is conferred upon a municipality the power to construct sewers by necessary implication is conferred the authority to discharge the sewage so collected into the usual and naturally adapted conduits, and where this is done skillfully and without negligence or malice, the injury resulting to lower riparian owners is *damnum absque injuria*.<sup>16</sup>

In an action by a riparian owner to recover damages against a municipality for the pollution by its system of sewerage of a water course, the city cannot avoid liability for its otherwise wrongful acts on the ground that such owner purchased his property, claimed to be damaged by the pollution, after the establishment of the sewer system, upon the ground that the plaintiff was not bound to anticipate the city's negligence.<sup>17</sup> In some cases it is held that, while it is within the discretion of the municipal authorities to adopt a particular plan of improvement, that discretion is subject to the qualification, that the plan adopted must be one not so palpably inefficient as to indicate want of care, or to imply a failure to exercise judgment by the city governing body.<sup>18</sup> And in the case of the *City of Louisville v. Norris*, it was held that the city's liability was not dependent upon its having notice, the court saying: "Appellant claims that, to be liable, the city must have had notice of the defects in the plan adopted by it, and that this notice should have been in the form of complaint by property owners after the defect had become apparent by experiment; in other words, that the city would not be liable for the first instance of damage, however heavy. The doctrine of notice invoked doubtless is that applying to cases where an improvement was

<sup>11</sup> *Kelly v. Pittsburg, etc., R. Co.*, 28 Ind. App. 457, 63 N. E. Rep. 233; *City of Valparaiso v. Keyes* (Ind. App.), 65 N. E. Rep. 175; *Carmichael v. City of Texarkana*, 94 Fed. Rep. 561; *Seaman v. City of Marshall*, 116 Mich. 327, 74 N. W. Rep. 484; *Huffman v. City of Brooklyn*, 48 N. Y. Supp. 132, 22 App. Div. 406; *City of Baltimore v. Schnitger*, 84 Md. 34; *Schroder v. City of Baraboo*, 93 Wis. 95; *Clay v. City of St. Albans*, 27 S. E. Rep. 368; *Bedell v. Village of Sea Cliff*, 46 N. Y. Supp. 226, 18 App. Div. 261; *Jordan v. City of Benwood*, 42 W. Va. 312, 26 S. E. Rep. 266, 36 L. R. A. 519; *City of Kearney v. Themanson*, 48 Neb. 74.

<sup>12</sup> *Chapman v. City of Rochester*, 110 N. Y. 273, 18 N. E. Rep. 88, 1 L. R. A. 296; *Butler v. Village of White Plains*, 69 N. Y. Supp. 193, 59 App. Div. 30; *Donovan v. Royall*, 26 Tex. Civ. App. 248, 63 S. W. Rep. 1054; *Winchell v. City of Waukesha*, 110 Wis. 101, 85 N. W. Rep. 668; *City of Jacksonville v. Doan*, 145 Ill. 23, 33 N. E. Rep. 878; *O'Brien v. City of St. Paul*, 18 Minn. 176; *Morse v. City of Worcester*, 139 Mass. 289, 2 N. E. Rep. 694; *Good v. City of Altoona*, 162 Pa. St. 493, 29 Atl. Rep. 741; *Carmichael v. City of Texarkana*, 94 Fed. Rep. 561.

<sup>13</sup> *Moody v. Village of Saratoga Springs*, 45 N. Y. Supp. 365, 17 App. Div. 207, affirmed, 163 N. Y. 581, 57 N. E. Rep. 1118.

<sup>14</sup> *Chapman v. City of Rochester*, 110 N. Y. 273, 18 N. E. Rep. 88, 6 Am. St. Rep. 366, 1 L. R. A. 296; *Donovan v. Royall*, 26 Tex. Civ. App. 248, 63 S. W. Rep. 1054.

<sup>15</sup> 110 Wis. 101, 85 N. W. Rep. 668.

<sup>16</sup> *City of Valparaiso v. Hagen*, 153 Ind. 337, 54 N. E. Rep. 1062, 48 L. R. A. 707.

<sup>17</sup> *City of San Antonio v. Pizzini* (Tex. Civ. App.), 58 S. W. Rep. 635.

<sup>18</sup> *City of Louisville v. Norris*, 23 Ky. Law Rep. 1195, 64 S. W. Rep. 958; *Gould v. City of Topeka*, 32 Kan. 485, 4 Pac. Rep. 822, 49 Am. Rep. 496; *McClure v. City of Red Wing*, 28 Minn. 194, 9 N. W. Rep. 767.

properly made but had afterwards become insufficient from accident or sudden and unexpected change, without the knowledge of the city. But where," said the court, "the initial construction is manifestly deficient for the purposes intended, — that is, in the language of the instruction given, was not such as 'ordinary care and skill' would suggest in order to 'carry off the water collected from such rainfalls as may be reasonably expected to occur in that neighborhood'—notice need not be given the city. One must take notice of his own lack of care, and cannot rely upon being first warned of the dangers it threatens."

The case of *Seifert v. City of Brooklyn*,<sup>19</sup> which is the leading case on this subject, affirms the liability of the city, after notice, notwithstanding its judicial or discretionary authority, where the exercise of such power "results in a direct and physical injury to the property of an individual, which, from its nature, is liable to be repeated and continuous, but is remedial by a change in plans and the adoption of prudential measures." In still other cases, however, it is held that the municipality has the absolute discretion in the original construction of its sewers, and the same discretion in the enlarging or altering of them, and that, even after notice of their inadequacy, there is no duty upon it to make alterations or repairs, provided the city has acted in good faith and not willfully and wantonly in such failure to remedy the defect.<sup>20</sup>

*Construction and Maintenance.*—Passing the municipal determination of sewer construction, and the plans thereof, the courts are agreed on the liability of the corporation in the remainder of the duties to be performed, namely, of construction and maintenance. These duties are ministerial only, and must be skillfully performed, that is, with reasonable care and skill.<sup>21</sup>

<sup>19</sup> 101 N. Y. 136, 4 N. E. Rep. 321.

<sup>20</sup> *Hession v. Mayor of Wilmington* (Del. Sup. Ct.), 27 Atl. Rep. 830; *Carr v. North Liberties*, 35 Pa. St. 324; *Johnson v. District of Columbia*, 118 U. S. 19, 6 Sup. Ct. Rep. 923.

<sup>21</sup> *Hamlin v. City of Bedford*, 95 Me. 308, 49 Atl. Rep. 110; *Hession v. Mayor, etc., of City of Wilmington* (Del. Super. Ct.), 27 Atl. Rep. 830; *Murphy v. City of Indianapolis*, 158 Ind. 238, 63 N. E. Rep. 469, and cases cited; *Allen v. City of Boston*, 150 Mass. 324, 34 N. E. Rep. 519, 38 Am. St. Rep. 423; *Chalkeley v. City of Richmond*, 88 Va. 402, 14 S. E. Rep. 339, 29 Am. St. Rep. 730; *Donahew v. City of Kansas City*, 136 Mo. 657, 38 S. W. Rep. 571.

So a municipality must exercise reasonable care to keep its sewers and drains unobstructed and in such condition as to carry off the water collected by it during a rain which might reasonably be expected in that locality.<sup>22</sup>

And in the application of this rule it makes no difference, so far as the liability of the city is concerned, if such a flood may be reasonably expected from previous occurrences, that it occurs only at wide and irregular intervals of time.<sup>23</sup>

Nor is it really required that the storm causing the damage was expected, if it was such as was likely to happen at any time, and might reasonably have been foreseen.<sup>24</sup>

The liability of the city in this regard does not depend upon its knowing in fact that its sewers have become obstructed. It is sufficient if such could have been known by the exercise of reasonable care in the inspection of its sewers; and notice need not therefore, be proved by the plaintiff,<sup>25</sup> unless required by ordinance or by statute, as is the case in some jurisdictions.<sup>26</sup>

The inspection required does not consist merely of an "optical" inspection, but practical tests should be made to ascertain the condition of sewers where defects and obstructions will not otherwise be disclosed.<sup>27</sup> A municipal corporation can no more acquire a prescriptive right to maintain a sewer in a negligent manner, amounting to a nuisance, than could an individual acquire by prescription the right to maintain a nuisance.<sup>28</sup>

<sup>22</sup> *City of Louisville v. Norris*, 23 Ky. Law Rep. 1195, 64 S. W. Rep. 958; *Messengale v. City of Atlanta*, 113 Ga. 966, 39 S. E. Rep. 578; *Harrigan v. Mayor, etc., of City of Wilmington*, 5 Houston, 140, 12 Atl. Rep. 779; *Talcott v. City of New York*, 69 N. Y. Supp. 360, 58 App. Div. 514; *Judd v. City of Hartford*, 72 Conn. 350, 44 Atl. Rep. 510; *City of Brunswick v. Tucker*, 20 S. E. Rep. 701.

<sup>23</sup> *Arnt v. City of Cullman* (Ala.), 31 So. Rep. 478.

<sup>24</sup> *Schumacher v. City of New York*, 57 N. Y. Supp. 968, affirmed, 166 N. Y. 103, 59 N. E. Rep. 773.

<sup>25</sup> *City of Louisville v. Gimple*, 22 Ky. Law Rep. 1110, 59 S. W. Rep. 1096; *District of Columbia v. Gray*, 6 App. D. C. 314; *Fidelity & Casualty Co. v. City of Seattle*, 16 Wash. 445, 47 Pac. Rep. 963.

<sup>26</sup> *City of Dallas v. McAllister*, 24 Tex. Civ. App. 206, 39 S. W. Rep. 173.

<sup>27</sup> *Fidelity & Casualty Co. v. City of Seattle*, 16 Wash. 445, 47 Pac. Rep. 963.

<sup>28</sup> *City of Litchfield v. Whitenack*, 78 Ill. App. 364; *Owens v. City of Lancaster*, 182 Pa. St. 257, 37 Atl. Rep. 858.

A property owner along the line of a sewer and connected with it cannot of course recover for any damage from overflow, if his own negligence in making connections with the main line of sewer in any manner contributes to such over-flow,<sup>29</sup> nor can there be a recovery where the damage to the plaintiff is the result of connections made by him in violation of the valid ordinances of the city,<sup>30</sup> unless the proper authorities of the city by some unequivocal act waive a compliance therewith.<sup>31</sup>

But there is no municipal liability for damages resulting from extraordinary floods, such as may not reasonably have been foreseen.<sup>32</sup> Nor does it make any difference that a sewer was allowed to become obstructed, if, unobstructed, the sewer was not sufficient to carry off the excessive rainfall.<sup>33</sup> Whether the damage in a particular case has resulted from the city's negligence or from the unusual rainfall is a question of mixed law and fact,<sup>34</sup> and a question of fact concerning which the city engineer is a competent witness.<sup>35</sup>

In an action for damages of this character only actual or compensatory damages may, in general, be recovered. If punitive damages are recoverable, under any circumstances, it is only where a city has acted willfully or maliciously and under very extraordinary circumstances,<sup>36</sup> or where it has in some legal way either authorized or subsequently approved of the wrongful act or negligence.<sup>37</sup>

<sup>29</sup> *Wilson v. City of Waterbury*, 73 Conn. 416, 47 Atl. Rep. 687.

<sup>30</sup> *Breuck v. City of Holyoke*, 167 Mass. 258, 45 N. E. Rep. 732.

<sup>31</sup> *Breuck v. City of Holyoke*, *supra*.

<sup>32</sup> *Fairlawn Coal Co. v. City of Scranton*, 148 Pa. St. 231, 23 Atl. Rep. 1069; *Fair v. City of Philadelphia*, 88 Pa. St. 309; *Collins v. City of Philadelphia*, 93 Pa. St. 272; *City of Chicago v. Rustin*, 99 Ill. App. 47; *City of Peoria v. Adams*, 72 Ill. App. 662; *Sundheimer v. City of New York*, 79 N. Y. Supp. 278, 77 App. Div. 53; *Cooper v. City of Wilmington*, 8 Houst. 140, 12 Atl. Rep. 779.

<sup>33</sup> *Hession v. Mayor, etc., City of Wilmington* (Del. Super. Ct.), 27 Atl. Rep. 830.

<sup>34</sup> *Harrigan v. Mayor, etc., City of Wilmington*, 8 Houston, 140, 72 Atl. Rep. 779; *District of Columbia v. Gray*, 6 App. D. C. 314.

<sup>35</sup> *Hession v. Mayor, etc., City of Wilmington* (Del. Super. Ct.), 27 Atl. Rep. 830.

<sup>36</sup> *Costich v. City of Rochester*, 73 N. Y. Supp. 837 68 App. Div. 623.

<sup>37</sup> *Willett v. Village of St. Albans*, 69 Vt. 330, 38 Atl. Rep. 72, *Scott v. Provo City*, 14 Utah, 31; *Railway Co. v. Prentice*, 147 U.S. 101, 37 L. Ed. 85, 13 Sup. Ct. Rep. 261

A city cannot avoid liability for negligent acts or omissions in the construction or maintenance of its sewers because of a mere irregularity of a technical nature in the proceedings of its proper authorities authorizing the construction of such sewers,<sup>38</sup> but where a system of sewer improvement is undertaken without any authority therefor, and not in execution of any delegated power, a municipality will, not be liable for negligence in its construction or maintenance.<sup>39</sup>

Nor is it competent to a municipality by a contract pursuant to an ordinance enacted by its legislative authority to relieve itself from liability for damage accruing to a property owner along the line of one of its sewers, resulting from its failure to perform the ministerial duty to keep its sewers unobstructed.

Speaking of a case of this character, Gillett J., in *Murphy v. City of Indianapolis*,<sup>40</sup> said: "If the ordinance in question will bear the construction placed on it by appellee it amounts to a requirement that persons who connect with its sewers must waive in advance any remedy for damages that might otherwise accrue to them on account of the city failing to perform a duty imposed upon it by law. Such an ordinance would be invalid, because it is incompetent for a city to provide by ordinance that it shall not be liable for a wrong that the law of the land makes it liable for, and because the existence of such immunity would be an encouragement to dereliction in the performance of duties of a public character."

It need hardly be said that residents of a city, who invoke its power to build a sewer, which the city is authorized to build, are not liable for any damage resulting from the city's negligence in constructing or maintaining the same.<sup>41</sup>

The negligence of a city in maintaining its sewers, may render it liable in damages not only to one injured in his property, but to one injured in his person, as by the escape of noxious gases therefrom<sup>42</sup> owing

<sup>38</sup> *Black v. City of Clarksville*, 88 Mo. App. 279.

<sup>39</sup> *Betham v. City of Philadelphia*, 196 Pa. St. 302, 46 Atl. Rep. 448.

<sup>40</sup> 158 Ind. 238, 62 N. E. Rep. 469.

<sup>41</sup> *Carmichael v. City of Texarkana*, 116 Fed. Rep. 845.

<sup>42</sup> *Munn v. City of Hudson*, 79 N. Y. Supp. 525, 61 App. Div. 343.

to the negligence of the city. It has been held, however, that there is no municipal liability for the sickness or death of an individual superinduced by the neglect of the authorities of a city to observe sanitary laws in the construction or maintenance of sewers.<sup>43</sup>

*Hughes v. City of Auburn* was an action for the death of one caused by foul and sickening odors emanating from the cellar of the house in which the deceased had lived, as a result of the overflow of sewage into the cellar because of the insufficiency of the sewer with which such house was connected. The direct act of the defendant, thus resulting, consisted in increasing the drainage area of an existing system, without increasing the outlet. In holding that there could be no recovery the court said: "In the construction and maintenance of a sewer or drainage system, a municipal corporation exercises a part of the governmental powers of the state, for the customary local convenience and benefit of all the people, and in the exercise of these discretionary functions the municipality cannot be required to respond in damages to individuals for injury to health resulting either from omissions to act or the mode of exercising the power conferred on it for public purposes, to be used at discretion for the public good." This case did not turn upon the act of the owner of the property in voluntarily connecting with the sewer, but on the general proposition of the non-liability of the city for negligently maintaining the sewer, a rather questionable application of the rule of non-liability.<sup>44</sup>

*Limitations.*—The statute of limitations will not begin to run against a party injured by the negligence of a municipal corporation respecting the violation of any duties regarding its sewerage, until injury is actually sustained.<sup>45</sup>

GLENDA BURKE SLAYMAKER,

Anderson, Indiana.

<sup>43</sup> *Hughes v. City of Auburn*, 161 N. Y. 96, 55 N. E. Rep. 389.

<sup>44</sup> See *Buckley v. City of New Bedford*, 155 Mass. 64, 29 N. E. Rep. 201; *Barry v. Lowell*, 8 Allen, 127.

<sup>45</sup> *City of Louisville v. Norris*, 23 Ky. Law Rep. 1195, 64 S. W. Rep. 958; *Kelly v. Pennsylvania Co.*, 28 Ind. App. 457, 63 N. E. Rep. 233; *Kansas City v. King* (Kan.), 68 Pac. Rep. 1093.

## MUNICIPAL CORPORATIONS—ORDINANCES— HOGS RUNNING AT LARGE.

### CRUM v. BRAY.

*Supreme Court of Georgia, January 27, 1905.*

Under the general welfare clause in the charter of a municipal corporation, the mayor and council have authority to pass an ordinance providing that hogs shall not be allowed to run at large within the corporate limits.

In order to make such an ordinance effectual, such mayor and council have authority by ordinance to empower the marshal to seize and impound such hogs as are at large in the streets, and to provide that, after giving notice to the owner by advertising for 10 days, he shall, at the expiration of that time, sell such hogs unless they are redeemed by the owner's paying the costs of feeding, and an impounding fee of 50 cents for each hog.

Such an ordinance is not illegal, as providing for the forfeiture of the animals impounded.

*SIMMONS, C. J.*: The city council of Cordele passed an ordinance which provided: "It shall be unlawful for hogs to run at large upon the streets and sidewalks of the city of Cordele, the same being declared a nuisance. All hogs found at large upon the streets and sidewalks of said city \* \* \* shall be impounded by the marshal or policeman in a suitable pound and, when so impounded, shall be advertised at the post office and council chamber by the marshal for ten days, at the end of which time they shall be sold if not redeemed by the owner. The owner of said hog or hogs shall pay all cost of feeding and fifty cents additional as an impounding fee for each hog so impounded." Under this ordinance the marshal of Cordele seized and impounded one suckling pig of the value of 50 cents, belonging to Crum, the plaintiff in error. Thereupon Crum brought an action of trover against the marshal to recover the pig. The marshal set up the foregoing ordinance in justification of his acts, and stated that he stood ready to deliver the pig to the plaintiff upon the payment of the impounding fee prescribed in the ordinance. The case was heard by the trial judge upon the petition and answer, and he held that the marshal was in lawful custody of the pig, and that plaintiff was not entitled to recover it without paying the fees prescribed in the ordinance. To this ruling Crum excepted.

The assignments of error in the bill of exceptions are very meager and indefinite, but in his argument the plaintiff in error contended (1) that the mayor and council had no power to declare a thing a nuisance which was not a nuisance at common law or by statute, and that even this right was limited by the charter of Cordele; and (2) that the enforcement of the ordinance providing for the sale of hogs amounted to a forfeiture of his property without due process of law.

1. We think it clear that under the general welfare clause in the charter of the city of Cordele the mayor and council had authority to pass the ordinance above set out. This clause of the charter is similar to that occurring in most of the

charters granted to municipal corporations by the legislature of this state. This general welfare clause confers broad and general powers upon the city authorities. Under such a clause the municipal authorities can pass any reasonable ordinance for the health, safety, protection, comfort, and good government of the people of the city which is not in conflict with the special provisions of the charter or with the constitution and laws of the state. The charter of Cordele did give special power to remove, as nuisances, certain buildings, chimneys, fences, and porches which should become dangerous to the public or an obstruction of the city streets, but this special enumeration was clearly not intended to be exhaustive of the powers of the city with regard to declaring what should be considered nuisances or with regard to abating nuisances. Under the general welfare clause the city had authority to provide for the abatement of any nuisance not dealt with in the provisions of the charter which gave these special powers. Even at common law, permitting hogs to run at large upon the streets of a city is a nuisance. *Helen v. Noe*, 25 N. Car. 493. It is therefore clear that the city authorities had full power and authority to pass an ordinance making it unlawful to permit hogs to run at large upon the streets and sidewalks of the city.

2. Incidental to this power, and in order to make such ordinance effectual, the city had authority to provide that the marshal should seize and impound hogs found at large upon the streets and sidewalks and after 10 days' advertisement, to sell the same unless they were redeemed by the owner's paying the cost of feeding and the impounding fee of 50 cents.

3. To the question whether the ordinance amounted to a forfeiture, we have devoted considerable time and study. After reading many authorities, we have come to the conclusion that the municipal authorities have power to seize and impound animals unlawfully upon the streets and have them sold for the purpose of paying the reasonable cost of feeding and the impounding fee, provided there is sufficient notice given. This view is sustained by the great weight of authority as found both in decisions and in textbooks. Ordinances providing for the seizure and sale of animals found at large, without any provision for notice to the owner, have been held to amount to a forfeiture, especially where the proceeds of the sale were disposed of in some way other than by deducting the expenses and paying over the remainder to the owner of the animals sold. So ordinances providing for the sale of the animals, and the deduction from the proceeds of the reasonable impounding fee and expenses, and for a fine imposed upon the owner without notice or judicial inquiry, have been held invalid as depriving the owner of the right of trial, and as forfeiting or confiscating his property without due course of law. Very different from such cases is the present one. Here there is no fine imposed as a penalty upon the own-

er of the impounded hog. His property is seized because it is upon the streets, and has become a nuisance which should be abated. Its detention for 10 days is itself one form of notice to him—a form of notice similar to that given in attachment. The ordinance also provides for public advertisement for 10 days, which is also constructive notice. There is no forfeiture of the property, but it is sold to pay the reasonable expenses unless the owner prefers to redeem it by paying those expenses. If the seizure and detention of the hog are unlawful, the owner is not without his remedy by due course of law. He can be fully heard and have all material questions judicially determined by an action of trover, which in this state "may be employed in any case in which replevin, detinue or trover could be used at common law." *Mitchell v. Georgia & A. Ry.*, 111 Ga. 762, 36 S. E. Rep. 971, 51 L. R. A. 622. This is indeed the remedy pursued by the plaintiff in error in the present case. For these reasons, we think the contentions of the plaintiff in error unsound.

One of the ablest opinions upon this subject which we have found is that of Valentine, J., in *Gilchrist v. Schmidling*, 12 Kan. 263. That case arose under an ordinance which provided for the impounding of cattle running at large in the streets of the city in the night time, and which in other respects was similar to that involved in the present case. In the opinion Justice Valentine said: "Now, it will be admitted that, where the law or an ordinance provides that the owner of cattle shall, in addition to the cost of taking them up, impounding and keeping them, pay for the damages they may do to private individuals while unlawfully running at large, the question of damages and the amount thereof can be determined only by judicial investigation, and generally in a suit between the parties interested. *Bullock v. Geomble*, 45 Ill. 218. And it will also be admitted that, where fines or forfeitures or anything of a penal or criminal nature or character is imposed, the question of whether the owner of the stock is liable for the same can only be determined by judicial investigation. *Const. Bill of Rights*, § 10; *Poppen v. Holmes*, 44 Ill. 360, 92 Am. Dec. 186; *Willis v. Legris*, 45 Ill. 289. It will also be admitted that some notice of some kind must be given, in order to render a sale of the property valid. *Rosebaugh v. Saffin*, 10 Ohio, 32. And it will also be admitted that the ordinance must be authorized by law or the charter of the city in order to be valid. See, as sustaining these propositions, *Rockwell v. Nearing*, 35 N. Y. 302, 307; *Campbell v. Evans*, 45 N. Y. 356; *Happy v. Mosher*, 48 N. Y. 313; *Ames v. P. M. L. D. & B. Cos.*, 11 Mich. 147, 83 Am. Dec. 731. But when nothing is attempted to be imposed upon the owner of the stock as damages or penalty, but only the reasonable cost of taking up, impounding, and keeping the same, and sufficient notice is provided for, and the ordinance authorized by the city charter, it

is believed that no court has ever held the law, or the ordinance founded thereon, to be unconstitutional or invalid, although the sale may not be made under judicial process, although there may be no provision for a judicial investigation, except the general remedies to determine whether the law or the ordinance has been complied with, and although the notice provided for may not be a personal notice, but only a notice, by publication or by posting. The ordinance which we are now considering does not attempt to impose upon the owner of the stock any damages or penalty, but provides merely for payment for taking up, impounding, and keeping the stock, and for posting notices of sale and making the sale. \* \* \* Only the charge for taking up and impounding applies, in the present case, for no other charges had yet accrued when the cattle were replevin, and no other charges were required from the owner before the officers were willing to surrender the cattle to the owner. Every charge authorized by said ordinance must be considered as remedial, in contradistinction to penal, and therefore does not come within those decisions which declare that a penalty can be imposed by judicial determination. Cattle running at large in the night time in a city are supposed to be a nuisance, or at least such a thing is supposed to be against the best interests of the public; hence they are taken up and impounded, not as a penalty against the owner, but as a protection to the public; and the fees are fixed merely as reasonable compensation for the trouble of taking them up and keeping them, and not in any sense as a penalty. These fees immediately become a lien upon the cattle, and can only be discharged by payment, and the owner has no right to the possession of his cattle until he makes this payment and discharges this lien. This is as far as this case goes, and this far the law and the ordinance must be valid beyond all doubt. No sale was attempted to be made in this case, and no fees were charged, except for taking up and impounding the cattle. Whether the officers could have made a valid sale of the cattle if they had not been replevin, it is not necessary now to determine, but yet we think they could. The officers were required to keep them at least six days before they offered them for sale, and could not then or at any time sell them without first giving at least three days' notice of the sale by posting notices in at least three public places in said city. \* \* \*

That ordinances and proceedings similar in their main features to those we are now considering are valid, we would refer to the following authorities: *Hellen v. Noe*, 25 N. Car. 493; *Whitfield v. Longest*, 28 N. Car. 286; *Gooselink v. Campbell*, 4 Iowa, 296; *Gilmore v. Holt*, 4 Pick. 257; and *Rockwell v. Nearing and Campbell v. Evans*, *supra*. Such proceedings as these do not determine a man's rights without giving him his day in court. He has his action

of replevin from the very moment that the officers take possession of the property until the statute of limitations bars such an action to try the legality and validity of the proceedings whereby his property is taken. And if any irregularity or injustice should intervene that would render the taking up of the property void, the same would also render the sale, and all other proceedings connected therewith, void. And all this could be shown in an action of replevin. For instance, if some enterprising city marshal or other officer should take up a cow in the daytime, or should take her from an enclosure in the nighttime, or should go beyond the city limits to find her, these facts could be shown in an action of replevin, and after the sale as well as before, and would render the sale, and every proceeding connected therewith, or with the taking up of the cow, void. Thus the owner of the cow or the owner of any other stock taken up and impounded has 'for injuries suffered' an ample 'remedy by due course of law.' " In addition to the case cited above, see *Mayor, etc., Cartersville v. Lanham*, 67 Ga. 753; *Mayor, etc., Knoxville v. King*, 7 Lea, 441; *Moore v. State*, 11 Lea, 35; *Wilcox v. Hemming*, 58 Wis. 144, 15 N. W. Rep. 435, 46 Am. Rep. 625; *City of Waco v. Powell*, 32 Tex. 258; 2 Cyc. 437-449; 1 *Dillon, Mun. Corp.* (4th Ed.), §§ 348-451.

Judgment affirmed. All the justices concur.

*NOTE.—Right of Municipality to Provide for Impounding and Sale of Animals Running at Large.*—A city has authority to provide for the restraint of animals running at large. There are no cases which announce a different rule. For that reason it would be without any considerable benefit to review the authorities in favor of this simple proposition.

It is also a general proposition, not, however, so unanimously sustained by authority that a town ordinance to restrain animals from running at large within the corporate limits applies to animals belonging to persons residing without the limits of the corporation. *Roberts v. Ogle*, 30 Ill. 459, 83 Am. Dec. 201; *Spitler v. Young*, 63 Mo. 42; *Gooselink v. Campbell*, 4 Iowa, 296; *Whitfield v. Longest*, 28 N. Car. 286; *Horney v. Sloan*, 1 Ind. 266; *Gilmore v. Holt*, 21 Mass. 257; *McKee v. McKee*, 47 Ky. (8 B. Mon.) 433. But see, *Contra*, *Manetta v. Fearing*, 4 Ohio (4 Ham.) 427, where it was held that incorporated towns cannot subject stray animals owned by persons not resident in the town, to their corporation ordinances. But compare *Dodge v. Gridley*, 10 Ohio, 173. See also *Commissioners of Plymouth v. Pettijohn*, 15 N. Car. 591, where it was held that an ordinance of the commissioners of a town, directing under a penalty, cattle to be penned at night, applies only to residents of the town. But see by the same court the discussion in the case of *Rose v. Hardie*, 98 N. Car. 44, where it was held that a town ordinance prohibiting swine from running at large, and providing for the impounding of them, and a penalty against the owners, is applicable to a nonresident who permits his hogs to run in the town limits. The Tennessee supreme court has announced what appears to be a very reasonable rule on this particular question. A charter of a city of that state provided that its ordinance should not be ob-

ligatory on persons or property of non-residents, citizens of the other states, except in case of intentional violation. The court held that an ordinance imposing a penalty for allowing animals to run at large in the streets was applicable to a non-resident who knew or had reason to believe that his stock, when turned loose in his own premises, would enter the city. *Knoxville v. King*, 75 Tenn. (7 Lea) 441.

The proper construction and application of these statutes is not always an easy undertaking, and, it is possible that a consideration of the cases will not be without value. For instance, it has been held that under a city ordinance prohibiting cattle from running at large within such city limits as may from time to time be designated by the common council by resolution, cattle may run at large anywhere in the city until the limits have been designated as provided in the ordinance. *Lenz v. Sherrott*, 26 Mich. 139. An ordinance of the city of St. Paul provided that cows might run at large from 5 o'clock in the morning until 9 o'clock in the evening from the 1st day of April to the 1st day of December. The court held in construing this ordinance, that to permit a cow to use a public street unattended, even though she might stray on a railroad track at a crossing, was, under such an ordinance, the exercise of a lawful right. *Fritz v. Railroad Co.*, 22 Minn. 404. It has been held in New York that a by-law of a town requiring that "all hogs shall be kept up," applied only to restrain swine from running at large on the highway, and not to prevent the owner from allowing his swine to run at large on his own land. *Shepherd v. Hees*, 12 Johns. 433. In the case of *Moore v. Crenshaw*, 1 White & W. Cir. Cas. Ct. App. (Tex.), 264, it was held that where plaintiff, being in the neighborhood of a city, turned his horse loose, and it strayed into the city, its running at large must be regarded as "permitted" by the owner, within an ordinance providing for punishment of the owner of animals permitted to run at large in the city.

In line with the decision in the principal case, it has been held that a city having power to declare what acts shall be misdemeanors, and to punish offenders by fine and forfeiture, and by imprisonment and labor, may provide for impounding animals running at large, and for sale thereof, on notice, if not reclaimed. *Moore v. State*, 79 Tenn. (11 Lea) 35. Thus a city ordinance prohibiting hogs from running at large, and imposing a fine therefor, and making it the duty of a marshal to take up hogs running at large, advertise and sell the same, if the owner does not, within three days, pay the fine and costs, giving to owner the balance, is not objectionable, as imposing a forfeiture, but is in the nature of an abatement of a nuisance. *Gooselink v. Campbell*, 4 Iowa (4 Clarke), 296; *Crosby v. Warren* (S. Car.), 1 Rich. Law, 385.

#### JETSAM AND FLOTSAM.

##### COMPULSORY EDUCATION WHERE PARENTS ARE UNABLE TO PROVIDE FOOD FOR CHILDREN.

The question whether, as the state has compelled the child to attend school, the municipality should provide food, in order that it may be in a fit condition to receive instruction, continues to be discussed with unabated vigor from many points of view. But there is a legal aspect which claims consideration. It is contended that some thousands of children are sent to school in such a condition that to use their minds

so as to benefit by the instruction of the teacher is absolutely detrimental to bodily health. It is "the duty of the parent of every child to cause such child to receive efficient elementary instruction." 39 Ad. & 40 Vict. ch. 79, sec. 4. By sending the child to school improperly nourished the parents neglects it in such a manner as to cause injury to its health, which is a punishable offense. 4 Ed. 7, ch. 15, sec. 1. The plea of poverty is not one which can be advanced. The Act applies (section 23) to a parent "who being without means to maintain a child fails to provide for its maintenance under the Acts relating to the relief of the poor, in like manner as if the parent had otherwise neglected the child." It is submitted that, provided the facts are as stated, the parents are guilty of cruelty for which the law provides due punishment. On the other hand, it might be maintained that the inability of the parent to provide sufficient nourishment for the child is a "reasonable excuse" within section 74 of the Education Act, 1870, which requires parents to send their children to school. It has been held that there may be a number of perfectly reasonable excuses besides the three mentioned in the Act. *Belper School Attendance Committee v. Bailey*, 9 Q. B. D. 259. Poverty has also been taken into account in arriving at a decision under this section. In *The London School Board v. Duggan* 13 Q. B. D. 176, the parents of a girl of twelve years old were prosecuted under the school attendance by-laws for allowing her to work instead of sending her to school. It was shown that it was impossible for the parents to have earned more money than they did, and they had not spent money in drink or in other unnecessary ways. "The father was a laborer at very small wages, and if the parents had been deprived of the additional money earned by the child in question it would have been impossible for them to have provided adequate food for their other children, and the health of some of the children would probably have been seriously injured." The court held that they gave "reasonable excuse." It would seem to be arguable, therefore, that a parent of like satisfactory character, unable to provide food of sufficient quantity or nutrition to enable the child to benefit by instruction, has a "reasonable excuse" for not sending it to school.—*Solicitors Journal*.

#### THE LEASE OF WEI-HAI-WEI.

The British government occupy Wei-hai-Wei under a lease from the government of China, made in 1898, and a question as to the construction of this lease has been raised in some newspapers during the last week. By the convention between Great Britain and China upon the 1st of July, 1898, the government of the emperor of China agree to lease to the government of the queen of Great Britain and Ireland, Wei-hai-Wei, in the province of Shantung, and the adjacent waters "for so long a period as Port Arthur shall remain in the occupation of Russia." It is suggested that China is entitled to contend that this lease has determined, inasmuch as Port Arthur has ceased to be in the occupation of Russia, and is now in the possession of Japan. The convention is not drawn up with the precision of a legal instrument, but the cesser of occupation contemplated by the high contracting parties would, we think, be supposed by any practical man to refer to something more permanent than the change of possession consequent on the capture of Port Arthur. The Russians have, it is true left Port Arthur, but there is an *animus revertendi*,

and nothing has occurred as between China and Russia to determine the lease of Port Arthur to Russia. It was clearly intended that the lease of Wei-hai-Wei should continue while the lease of Port Arthur was in force. We may think it unlikely that Russia should recover Port Arthur before the present year has elapsed, but, though unlikely, it can hardly be said to be impossible. Russia would then re-occupy the place under the original lease. Can England be expected in the meantime to withdraw from Wei-hai-Wei? Any discussion on the subject is of course premature, as the lease of Wei-hai-Wei is not likely to come under discussion, if at all, till the close of the present war.—*Solicitor's Law Journal*.

#### PAYING HONEST DEBTS.

An Oklahoma law firm which makes a specialty of collections prints the following poem on the back of the first notice sent to a delinquent. A member of the firm writes: "We sometimes get an answer to the poetry where the communication is entirely ignored."

"Bright side? Bless your heart, there's nothing in the universe without;  
Massive bars of sunshine's bullion, poorly hidden, lie about;  
Every day we are ignoring opportunities to smile,  
And we frown and weep and worry over petty things the while.  
In our fruitless fight for fortune, what's the use to fume and fret  
While it's still such worlds of pleasure paying off an honest debt?  
'Week by week we see the surplus we had planned for disappear.  
And we're sure the same conditions must continue year by year;  
Then Despair comes round and taunts us with a fiendish, mocking grin,  
And life's chances seem to offer little chance for us to win.  
Laugh it off and tell Surrender: 'Not quite ready for you yet;  
For there's lots of joy in living—great old fun to pay a debt!'  
'Tis no hollow hope I'm holding out, O brother mine, in song—  
Since my own life learned the secret I've been singing, loud and long;  
Every paltry dime expended to dispel an honest need  
Is a raw recruit enlisted in the fight against King Greed;  
Smile a benediction on it—speed it not with eyelids wet.  
For there is no purer pleasure than to pay an honest debt."

*Selected.*

#### BOOK REVIEWS.

##### PINGREY ON EXTRAORDINARY, INDUSTRIAL AND INTERSTATE CONTRACTS.

Specialization is still the tendency of modern law book making. This tendency, moreover, is accentuated by the increase in the accumulation and variety of the new phases of the complex commercial and social relations of modern civilization. The law as an elastic rather than an accurate science is called upon to regulate the operation of business and social life under these gradually changing conditions by the application thereto of the ancient principles of the common law. The result of such application is not always the same in different tribunals, as different

judges emphasize the importance of different principles and thus arrive at conclusions which, if not at variance with each other, are sufficient to bring confusion into the law. Here it is that the jurist, taking up his pen as a law text writer, is able to harmonize the decisions and bring order and harmony where formerly chaos and discord seemed to prevail. This is the great work of the text writer as we conceive it.

These remarks are specially called forth by the appearance of a new law text book on a new subject of law, over which the authorities have hitherto wrangled to little purpose. We refer to that new treatise entitled "Extraordinary Industrial and Interstate Contracts," by D. H. Pingrey. The author in this work has included contractual relations of a peculiar or extraordinary nature, such as trades union membership and liability, blacklisting, boycotts, option dealing on change, railroad pools and rebates trading stamp schemes, lotteries, agreements to arbitrate in building contracts, truck store scrip, agreements contained in railroad passes or other gratuitous tickets, contracts limiting liability of employers or carriers, contracts violating the right of privacy, anticipatory rescission and termination of contracts. Besides these subjects there is considered in their newer applications the subjects of Implied Contracts, Impairment of Obligation of Contracts, Infancy, Insane Persons' Contracts, Statute of Limitations, Statute of Frauds, Assignment, and everything to make a complete treatise on extraordinary contracts. The author of this work is well known as an instructor in the law school of the Illinois Wesleyan University at Bloomington, Ill., and among the legal profession as a law book writer of ability, and he has handled his subject in this particular instance in a manner that will commend itself favorably to the profession.

Printed in one volume of 952 pages and published by Matthew Bender, Albany, N. Y.

#### HUMOR OF THE LAW.

"Are you the judge of reprobate?" said the old lady as she walked into the judge's office.

"I am the judge of probate," was the reply.

"Well, that's it, I expect," quoth the lady. "You see, my husband dies detested, and left me several little infidels, and I want to be their executioner."

A gentleman in the country, who had just buried a rich relation who was an attorney, was complaining to Foote, who happened to be on a visit with him, of the very great expense of a country funeral in respect to carriages, hat bands, scarves, etc.

"Why, do you bury your attorneys here?" asked Foote gravely.

"Yes, to be sure we do; how else?"

"Oh, we never do that in London."

"No?" said the other much surprised, "how do you manage?"

"Why, when the patient happens to die, we lay him out in a room over night by himself, lock the door throw open the sash, and in the morning he is entirely off."

"Indeed!" said the other in amazement; "what becomes of him?"

"Why, that we cannot exactly tell, not being acquainted with supernatural causes. All that we know of the matter is, that there's a strong smell of brimstone in the room the next morning."

"I—I've bought a farm about ten miles out of town," said the man with the black eye, as he entered a lawyer's office.

"Exactly—exactly. You've bought a farm and you've discovered that one of the line fences takes in four or five feet of your land. You attempted to discuss the matter with the farmer, and he resorted to arms."

"Yes."

"Well, don't you worry. You can first sue him for assault. Then for battery. Then for personal damages. Then we'll take up the matter of the fence, and I promise you that even if we don't beat him we can keep the case in court for at least 25 years. Meanwhile, he'll probably hamstring your cows, poison your calves and set fire to your barn, and you can begin a new suit almost every week. My dear man, you've got what they call a pudding and you can have fun from now on to the day you die of old age."

The little duels between the eminent counsel engaged in a case now prominent at the Old Bailey are, says the *St. James Gazette*, such as one expects from the meeting of men so ready-witted and keenly interested in their respective causes. Such encounters have provoked many a diverting scene as well since as before the days of *Bardell v. Pickwick*. But we do not nowadays go so far as happened when Chief Justice Adams, the American judge, was an advocate. During a trial in which he was engaged, counsel for the other side wrote with chalk upon Adam's hat: "This is the hat of a d—d rascal!" Adams turned gravely to the bench. "I claim the protection of the court," he said. "Brother Sullivan has been stealing my hat, and writing his own name upon it."

## WEEKLY DIGEST.

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2. ACCIDENT INSURANCE—Right of Beneficiary in Case of Death.—A wife held not entitled to recover for the death of her husband under an accident policy, unless he could have recovered on account of the accident, had his death not resulted.—*Roberts v. Etna Life Ins. Co.*, Ill., 72 N. E. Rep. 364.

3. ADVERSE POSSESSION—Removal of Building.—Acceptance of lease from city authorities by defendant in suit to compel removal of building from public reservation in city held not to estop defendant to claim adverse possession as defense.—*Broad v. Beatty*, Ark., 83 S. W. Rep. 339.

4. ADVERSE POSSESSION—Trespass to Try Title.—In trespass to try title, the possession of defendants from the time of the judgment until they obtain a lease from the plaintiffs held not, as a matter of law, the possession of plaintiffs; such possession being a question of fact.—*Logan v. Robertson*, Tex., 83 S. W. Rep. 395.

5. ALIENS—Homicide.—That a subject of the Emperor of Austria was tried by information, and not by indictment, held no ground for reversal.—*State v. Neighbaker*, Mo., 88 S. W. Rep. 523.

6. ALTERATION OF INSTRUMENTS—Forged Check.—A change by the holder of a check of the name of the bank on which it is drawn is a material alteration.—*Morris v. Beaumont Nat. Bank*, Tex., 83 S. W. Rep. 36.

7. APPEAL AND ERROR—Abstract on Appeal.—The overruling of a demurrer to plaintiff's evidence will not be reviewed, unless all the evidence is contained in the abstract.—*Nash v. Kansas City Hydraulic Press Brick Co.*, Mo., 83 S. W. Rep. 90.

8. APPEAL AND ERROR—Bill of Exceptions.—The statement of the judge in the case on appeal as to what occurred on trial must be taken as absolutely true.—*Cameron Barkely Co. v. Thornton Light & Power Co.*, N. Car., 49 S. E. Rep. 76.

9. APPEAL AND ERROR—Burnt Records Act.—As against a collateral attack on a judgment under the burnt records act it will be presumed on appeal that the court found a decree in a former proceeding instituted by plaintiff's grantor void and not a bar to the proceeding in question.—*Bennett v. Roys*, Ill., 72 N. E. Rep. 380.

10. APPEAL AND ERROR—Discretion of Court in Granting a New Trial.—The exercise of discretion by the trial court, in granting a new trial for error in an instruction, will not be reversed if there is any doubt about the propriety of the instruction.—*Delaplain v. Kansas City, Mo.*, 83 S. W. Rep. 71.

11. APPEAL AND ERROR—Motions After Mandate.—The supreme court will not entertain a motion to bring a cause forward on the docket from a preceding term and continue the cause after the mandate has been sent down.—*Monahan v. Monahan*, Vt., 59 Atl. Rep. 176.

12. APPEAL AND ERROR—Order Disapproving Undertaking.—On an order denying a motion to resettle an order disapproving an undertaking on appeal, appellant was entitled to a full recital in the order of all papers used or read on the motion.—*Davis v. Reflex Camera Co.*, 90 N. Y. Supp. 877.

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14. **APPEAL AND ERROR—Pleading.**—The striking out of a special plea, even if error, is harmless, where nothing could have been shown under it which was not available under the general issue, which was pleaded.—*Louisville & N. R. Co. v. Smith, Ala.*, 37 So. Rep. 490.
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16. **APPRENTICES—Continuance After Majority.**—At common law and under the express provisions of Code, § 3229, the parents of a minor have no right to bind him as an apprentice beyond his minority.—*Walton v. Atchison, T. & S. F. R. Co., Iowa*, 101 N. W. Rep. 506.
17. **ASSAULT AND BATTERY—Evidence as to Pain Suffered.**—Under an indictment covering various degrees of assault, evidence by the state that the assaulted party suffered great pain is not immaterial.—*Harmon v. State, Fla.*, 37 So. Rep. 520.
18. **ASSIGNMENTS—Knowledge of Assignee.**—Knowledge, by an assignee of a chose in action, of a fact putting on inquiry, is equivalent to knowledge of the ultimate fact.—*National Bank of Bristol v. Baltimore & O. R. Co., Md.*, 59 Atl. Rep. 134.
19. **BANKRUPTCY—Discharge.**—Knowledge of bankruptcy proceedings on part of creditor, not acquired until after discharge, though in time to prove claim under Bankr. Act July 1, 1898, and to move under U. S. Comp. St. 1901, to revoke the discharge, held not actual knowledge of the proceedings, which under section 17 is essential to the release by discharge of provable debts not duly scheduled.—*Birkett v. Columbia Bank, U. S. S. C.*, 258 Sup. Ct. Rep. 38.
20. **BANKS AND BANKING—Assignability of Bill of Lading.**—A bill of lading, though nonnegotiable by its terms, is assignable.—*National Bank of Bristol v. Baltimore & O. R. Co., Md.*, 59 Atl. Rep. 134.
21. **BANKS AND BANKING—Honoring Forged Check.**—A bank honors a forged check at its peril.—*Morris v. Beaumont Nat. Bank, Tex.*, 38 S. W. Rep. 36.
22. **BIGAMY—Invalidity of Prior Marriage.**—Where defendant in a prosecution for bigamy was only 14 years of age when first married in a foreign country, he has the burden of showing that the marriage was invalid.—*Sokel v. People, Ill.*, 72 N. E. Rep. 852.
23. **BILLS AND NOTES—Bill of Lading, Transfer to Innocent Purchaser.**—One who in good faith takes a bill of lading from a vendee acquires an unassailable title to the goods, notwithstanding fraud of the vendee.—*National Bank of Bristol v. Baltimore & O. R. Co., Md.*, 59 Atl. Rep. 134.
24. **BILLS AND NOTES—Co Maker, Notice of Nonpayment.**—A third person, placing his name on the back of a promissory note before delivering it to the payee is an original promisor or maker, not entitled to have demand or notice of nonpayment, and as to him no consideration need be proved.—*Cherry v. Sprague, Mass.*, 72 N. E. Rep. 456.
25. **BILLS AND NOTES—Complaint, in Action on Note.**—Complaint in an action on a note executed by a corporation held sufficient, without alleging that the note was executed for a debt of the corporation.—*Midland Steel Co. v. Citizens' Nat. Bank, Ind.*, 72 N. E. Rep. 290.
26. **BILLS AND NOTES—Delivery, an Adoption of Signature.**—Delivery of a note by the apparent maker as his note is an adoption of the signature by whomsoever made.—*Harris v. Tinder, Mo.*, 38 S. W. Rep. 34.
27. **BILLS AND NOTES—What Law Governs.**—The liability of the maker of a note payable in another state is determined by the law of that state.—*Midland Steel Co. v. Citizens' Nat. Bank, Ind.*, 72 N. E. Rep. 290.
28. **BONDS—Material Alteration.**—In an action on bonds, the fact that the name of one of the makers was forged did not affect the liability of the others.—*Rocky Mount Loan & Trust Co. v. Price, Va.*, 49 S. E. Rep. 73.
29. **BONDS—Presumption of Validity.**—A bond given by a mother to her son for services rendered as agent held presumably valid.—*Burwell v. Burwell, Va.*, 49 S. E. Rep. 68.
30. **BROKERS—Commissions, Recovery Under Common Count.**—A real estate broker's commission, earned under an express contract, may be recovered under the common counts.—*Risley v. Beaumont, N. J.*, 59 Atl. Rep. 145.
31. **BUILDING AND LOAN ASSOCIATIONS—Insolvency, Borrowing Member.**—On insolvency of building association, premiums are no longer chargeable against borrowing member.—*People v. New York Bld. Loan Bank, Co.*, 90 N. Y. Supp. 809.
32. **BURGLARY—Witness' Cross-Examination.**—On prosecution for breaking and entering, the defendant should be allowed to cross-examine a state's witness as to her usual custom in closing the door.—*Adkinson v. State, Fla.*, 37 So. Rep. 522.
33. **CARRIERS—Care of Live Stock.**—A carrier held only required to furnish such a number of pens for delivering cattle as its own business appears to call for, without regard to that of other carriers.—*Casey v. St. Louis Southwestern Ry. Co., Tex.*, 38 S. W. Rep. 20.
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35. **CARRIERS—Injury to Licensee on Right of Way.**—A railway company, permitting the public to use its right of way for a passage, held only bound to keep the way free from dangers.—*Quantz v. Southern Ry. Co., N. Car.*, 49 S. E. Rep. 79.
36. **CARRIERS—Limiting Liability.**—To constitute a ratification of the act of a cartman in modifying a shipping order, there must be an intent to ratify with full knowledge of all the material circumstances.—*Russell v. Erie R. Co., N. J.*, 59 Atl. Rep. 150.
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38. **CARRIERS—Negligence, Dog Missing from Crate.**—Where three dogs were delivered to a carrier, and only two remained in the crate when delivered at its destination, negligence upon the part of the carrier would be presumed.—*Adams Exp. Co. v. Walker, Ky.*, 38 S. W. Rep. 106.
39. **CARRIERS—Through Bills of Lading.**—Carriers may issue through bills of lading and make contracts for interchange of freight between each other.—*Graham & Ward v. Macon, D. & S. R. Co., Ga.*, 49 S. E. Rep. 75.
40. **COMMERCE—State Regulation of Pilotage.**—State legislation concerning pilotage held not necessarily repugnant to the commerce clause of the federal constitution.—*Olsen v. Smith, U. S. S. C.*, 25 Sup. Ct. Rep. 52.
41. **CONSTITUTIONAL LAW—Assessments for Public Improvement.**—Assessing by the frontage rule the entire cost of a street extension held not so manifestly unfair to owner whose property lies beyond the point where the improvement ends as to render assessment void.—*City of Seattle v. Kelleher, U. S. S. C.*, 25 Sup. Ct. Rep. 44.
42. **CONSTITUTIONAL LAW—Collateral Attack of Foreign Judgment.**—Due process of law held wanting in proceedings by which judgment is taken in state court on warrant of attorney authorizing confession in favor of the holder, if plaintiff in confession before commencement of the suit had ceased to own the note.—*National Exch. Bank v. Wiley, U. S. S. C.*, 25 Sup. Ct. Rep. 70.
43. **CONSTITUTIONAL LAW—Compelling Attendance as Witness in Another State.**—Code Cr. Proc. § 681a, authorizing subpoena to compel citizen of New York to testify as a witness in a criminal case outside the state,

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44. **CONTRACTS**—Acceptance by Mail.—A proposition submitted by mail could be accepted by mail, and could not afterwards be withdrawn, regardless of the miscarriage of the letter of acceptance.—*Carter v. Hibbard*, Ky., 83 S. W. Rep. 112.

45. **CONTRACTS**—Agreement to Hold Money in Readiness to Loan.—Agreement to hold money in readiness to loan defendant held to obligate defendant to pay interest during specified period, whether he took advantage of the loan or not.—*Ehlen v. Selden*, Md., 59 Atl. Rep. 120.

46. **CONTRACTS**—Power of Architects.—Under a building contract, the architects held empowered to decide as to the meaning of the specifications, without giving notice, and on such evidence as they choose to receive.—*Norcross v. Wyman*, Mass., 72 N. E. Rep. 347.

47. **CONVERSION**—Will, Intent of Testator.—Testator's real property held under his will converted into personality, and his children had no interest in the same as real estate.—*Nelson v. Nelson*, Ind., 72 N. E. Rep. 482.

48. **CORPORATIONS**—Fraud of Directors.—Stockholders of a corporation held entitled to maintain a suit for an accounting against directors of the corporation who participate in sales of the company's property to themselves.—*Barry v. Moeller*, N. J., 59 Atl. Rep. 97.

49. **CORPORATIONS**—Laches, Pledge of Stock.—A pledgee of certain corporate stock held not barred by laches from enforcing the same.—*White River Sav. Bank v. Capital Sav. Bank & Trust Co.*, Vt., 59 Atl. Rep. 197.

50. **CORPORATIONS**—Preference, Assignment.—A bank held not entitled to a preference on an assignment for the benefit of creditors by a debtor of a bank.—*In re Kittanning Electric Light, Heat & Power Co. Estate*, Pa., 59 Atl. Rep. 266.

51. **COVENANTS**—Breach of Warranty of Title.—In an action for breach of warranty of title, defendant held not prejudiced by the measure of damages adopted.—*Chenault v. Thomas*, Ky., 83 S. W. Rep. 109.

52. **CRIMINAL EVIDENCE**—Homicide, Insanity.—Lay witness may characterize acts of which he testifies as rational or irrational, but cannot give opinion as to accused's sanity.—*People v. Spencer*, N. Y., 72 N. E. Rep. 461.

53. **CRIMINAL EVIDENCE**—Sale of Intoxicating Liquors.—Testimony on a prosecution for illegal sale of liquors, that witness went to defendant because he understood that he had been selling liquors, held harmless.—*Haynes v. State*, Tex., 83 S. W. Rep. 16.

54. **CRIMINAL EVIDENCE**—Voluntary Confessions.—Confessions voluntarily made are admissible, though made to an officer having the party under arrest.—*Williams v. State*, Fla., 37 So. Rep. 521.

55. **CRIMINAL TRIAL**—Bigamy, Evidence.—The admission of record proof of marriage in a prosecution for bigamy does not violate the constitutional guaranty to persons accused of crime of meeting witnesses face to face.—*Sokol v. People*, Ill., 72 N. E. Rep. 382.

56. **CRIMINAL TRIAL**—Capital Case, Appeal from Oklahoma Supreme Court.—Lack of statutory authority precludes a review in the Supreme Court of judgments of the Supreme Court of the territory of Oklahoma in capital cases.—*New v. Territory of Oklahoma*, U. S. S. C., 25 Sup. Ct. Rep. 68.

57. **CRIMINAL TRIAL**—Certiorari, Summary Conviction.—A summary conviction by an inferior magistrate on a penal statute cannot be supported without a record showing all the requisites of a legal trial and conviction.—*City of Orange v. McConnell*, N. J., 59 Atl. Rep. 97.

58. **CRIMINAL TRIAL**—Rape, Impeachment, Unwilling Witness.—Where prosecutrix was not constant in her accusation that defendant was guilty of rape, her deposition given before a magistrate was admissible to impeach her at the trial, but not as substantive evidence of the crime charged.—*People v. Miner*, Mich., 101 N. W. Rep. 536.

59. **CROPS**—Trespass, Rights of Cropper.—A trespasser who plants a crop on land in the rightful possession of another has no right to harvest the same, and if he does so, he is liable therefor in an action of trover.—*Stebbins v. Demorest*, Mich., 101 N. W. Rep. 528.

60. **DAMAGES**—Penalty, Liquidated Damages.—The question whether money to be paid on the nonperformance of a covenant is liquidated damages, or a penalty, is determined by the intention of the parties.—*Santa Fe St. Ry. Co. v. Schutz*, Tex., 83 S. W. Rep. 39.

61. **DAMAGES**—Personal Injuries, Plaintiff a Federal Pensioner.—The fact of plaintiff's drawing a federal pension for physical debility held pertinent on the question of his condition prior to the injuries sued for.—*Hawkins v. Missouri*, K. & T. Ry. Co. of Texas, Tex., 83 S. W. Rep. 52.

62. **DEATH**—Damages, Minor Child.—In an action by a parent for the death of a minor child, exclusion of evidence showing the value of the child's support in the neighborhood held error.—*Southern Indiana Ry. Co. v. Moore*, Ind., 72 N. E. Rep. 479.

63. **DEEDS**—Delivery by Third Person After Death.—Delivery of a deed to a third person, for delivery to the grantee after the grantor's death, passes title.—*Kirkwood v. Smith*, Ill., 72 N. E. Rep. 427.

64. **DEEDS**—Delivery, Presumption.—Where a deed is delivered by the grantor to a third person, there is no presumption that such delivery is for the use of the grantee.—*Thomas v. Sullivan*, Mich., 101 N. W. Rep. 528.

65. **DEPOSITIONS**—Failure of Clerk to Mark "Filed."—The fact that a deposition was not marked "Filed" by the clerk did not furnish any reason for its exclusion; it having been duly taken and returned, and placed among the papers in the case.—*Fire Assn. of Philadelphia v. Masterson*, Tex., 83 S. W. Rep. 49.

66. **DIVORCE**—Alimony, Contempt.—Failure of a divorced husband to comply with a decree directing the payment of alimony is *prima facie* evidence of contempt.—*Shaffner v. Shaffner*, Ill., 72 N. E. Rep. 447.

67. **ELECTRICITY**—Personal Injury, Negligence of Light Company.—One whose death was caused by contact with a wire negligently charged with 2,000 volts of electricity, when it should have carried but 104, held not guilty of contributory negligence.—*McCabe v. Narragansett Electric Lighting Co.*, R. I., 59 Atl. Rep. 112.

68. **ELEVATORS**—Personal Injury.—In an action for injuries to plaintiff while seeking to use an elevator maintained in defendants' apartment building, evidence that just prior to the accident defendants obtained indemnity insurance against accidents arising from operating such elevator held admissible.—*Perkins v. Rice*, Mass., 72 N. E. Rep. 323.

69. **EQUITY**—Objection to Jurisdiction, Waiver.—An objection to jurisdiction in equity on the ground of an adequate remedy at law is waived, unless made within a reasonable time after bill filed.—*Pennsylvania R. Co. v. Bogert*, Pa., 59 Atl. Rep. 100.

70. **ESTOPPEL**—Assuming Inconsistent Position to Prejudice of Another.—A party who has assumed a certain position in a cause is precluded from thereafter assuming an inconsistent position to the prejudice of another.—*Rhea v. Shields*, Va., 49 S. E. Rep. 70.

71. **ESTOPPEL**—Pleadings, Allegations.—Though certain allegations made in a suit brought by A against B, to which suit C is no party, may be utilized by C in a suit between himself and A, as containing admissions in his favor, they cannot be urged by him as working an estoppel against A. Between them they are open to explanation and correction.—*Brown, Chipley & Co. v. Haigh*, La., 37 So. Rep. 478.

72. **ESTOPPEL**—Quo Warranto Proceedings.—The doctrine of estoppel held not to apply to *quo warranto* proceedings.—*People v. Burns*, Ill., 72 N. E. Rep. 374.

73. **EVIDENCE**—Accounting, Guardian and Ward.—A court of chancery in a suit against a guardian for an accounting held entitled to set aside the guardian's dis-

charge, which was procured by fraud, under a prayer for general relief.—*Willis v. Rice*, Ala., 87 So. Rep. 507.

74. EVIDENCE—Declaration of Master's Manager.—In an action for injuries to a servant, statement of defendant's manager to plaintiff's wife that it was not plaintiff's fault that he was hurt held incompetent.—*Alquist v. Eagle Iron Works*, Iowa, 101 N. W. Rep. 520.

75. EVIDENCE—Delay in Shipment.—An experienced shipper of stock held qualified to testify as to what was a reasonable time for a trip between certain points.—*McCrary v. Chicago & A. Ry. Co.*, Mo., 88 S. W. Rep. 82.

76. EVIDENCE—Inadequacy of Price.—Inadequacy of price is insufficient to justify vacation of a sale of decedent's estate to pay debts.—*Costigan v. Truesdell*, Ky., 83 S. W. Rep. 98.

77. EVIDENCE—Presumption, Laws of Sister State.—In an action on a South Dakota contract, there is no presumption that the statute of South Dakota is the same as that of Massachusetts.—*Cherry v. Sprague*, Mass., 72 N. E. Rep. 456.

78. EVIDENCE—Receipt, Application of Payment.—A receipt held not conclusive as to the debt on which the debtor directed the payment to be made.—*Lynn v. Bean*, Ala., 87 So. Rep. 515.

79. EXCEPTIONS, BILLS OF—Consideration of Questions in Agreed Bill.—The court will consider questions presented by an agreed bill of exceptions presented by a commissioner after the disallowance of a former bill.—*Scaplen v. Blanchard*, Mass., 72 N. E. Rep. 346.

80. EXECUTORS AND ADMINISTRATORS—Bank Deposits Tracing Funds.—An order in a deposit bank book for payment of the money to the order of the depositor's husband held not to authorize payment to the husband's administrator.—*Cole v. Bates*, Mass., 72 N. E. Rep. 333.

81. EXECUTORS AND ADMINISTRATORS—Enforcement of Claim.—Until a claim is established against an estate, a court of equity will not enforce the claim against a fund alleged to be held by the executrix in trust for the payment of debts.—*Seymour v. Goodwin*, N. J., 59 Atl. Rep. 93.

82. EXECUTORS AND ADMINISTRATORS—Partnership. Power of Executor.—Under Rev. St. 1895, art. 1867, the executor of a deceased partner has no power to continue the business of the partnership.—*Altgelt v. Alamo Nat. Bank*, Tex., 83 S. W. Rep. 6.

83. FEDERAL COURTS—Jurisdiction.—Federal supreme court held not bound on question of jurisdiction by a prior case in which jurisdiction was entertained without suggestion as to the want of it.—*New v. Territory of Oklahoma*, U. S. S. C., 25 Sup. Ct. Rep. 68.

84. FEDERAL COURTS—Necessity of Security of Costs.—A circuit court of Appeals cannot, without statutory authority, permit prosecution *in forma pauperis* of a writ of error sued out of that court.—*Bradford v. Southern Ry. Co.*, U. S. S. C., 25 Sup. Ct. Rep. 55.

85. FIRE INSURANCE—Change in Title.—Fire insurance company held not entitled to claim forfeiture under a clause making the policy void if any change took place in the title without written consent.—*Nute v. Hartford Fire Ins. Co.*, Mo., 83 S. W. Rep. 83.

86. FIRE INSURANCE—Iron Safe Clause.—Iron safe clause of a fire policy held not void, under Code § 1743.—*Rundell & Hough v. Anchor Fire Ins. Co.*, Iowa, 101 N. W. Rep. 517.

87. FIRE INSURANCE—Title to Property.—A fire insurance company held estopped from asserting a policy on building in Cherokee Nation to be invalid on the ground that the insured was not the owner of the real estate. Rev. St. U. S. §§ 2116, 2118.—*German-American Ins. Co. v. Paul*, Ind. Ter., 83 S. W. Rep. 60.

88. FOOD—Oleomargarine.—Under *Bates' Ann. St. § 4200-18*, held, that a dealer in oleomargarine containing coloring matter cannot shield himself by the plea of ignorance, or that he has made the sale for analysis.—*State v. Rippeth*, Ohio, 72 N. E. Rep. 298.

89. FRAUD—Releasing Inchoate Right of Dower.—An inchoate right of dower is a valuable right in property, for which a married woman, who induced to release the same by false and fraudulent representations, is entitled to damages.—*Garry v. Garry*, Mass., 72 N. E. Rep. 385.

90. FRAUDS, STATUTE OF—Contract to Hold Money in Readiness to Loan.—Agreement to hold money in readiness to loan defendant, the loan, if made, to be secured by mortgage, held not an agreement to mortgage land, and hence not within the fourth section of the statute of frauds.—*Ehlen v. Selden*, Md., 59 Atl. Rep. 120.

91. FRAUDS, STATUTE OF—Debt of Another.—The promise of a subcontractor to pay one who had furnished materials to a subcontractor was obnoxious to the statute of frauds.—*Wilson v. Dietrich*, N. J., 59 Atl. Rep. 251.

92. FRAUDS, STATUTE OF—Parol Contract to Devise Land.—A parol contract to devise land held within the statute of frauds.—*Lozier v. Hill*, N. J., 59 Atl. Rep. 284.

93. FRAUDS, STATUTE OF—Resulting Trust, Parol Agreements.—A parol agreement between the trustee of a resulting trust and the cestui que trust that the trustee was to have the property under certain conditions was void under the statute of frauds.—*Brennan v. Schell*, Ill., 72 N. E. Rep. 412.

94. GARNISHMENT—Not an Independent Action.—A garnishment proceeding is not an independent action, but incidental to the main action.—*Wilson v. Pennoyer*, Minn., 101 N. W. Rep. 502.

95. GUARANTY—Construction, Law of Place of Acceptance.—A contract of guaranty, not becoming effectual until accepted, will be construed according to the law of the place of acceptance.—*Callender, McAuslan & Troup Co. v. Flint*, Mass., 72 N. E. Rep. 345.

96. HOMESTEAD—Execution Sale.—An execution sale of property occupied by the judgment debtor as a homestead conveys the property to the purchaser, subject to the homestead right, so that he takes title in fee on the death of the judgment debtor and his wife.—*Strong v. Peters*, Ill., 72 N. E. Rep. 369.

97. HOMICIDE—Principal and Accessories—Defendant held a principal in the crime of murder, and guilty, regardless of the conviction or acquittal of his co-conspirator.—*Dean v. State*, Miss., 87 So. Rep. 501.

98. HUSBAND AND WIFE—Goods Charged to Husband.—That goods were charged to defendant's husband, bills rendered to him therefor, and that he gave notes for the price, held not to preclude the maintenance of an action for the price by the seller against the wife.—*Mollineaux v. Clapp*, 90 N. Y. Supp. 880.

99. HUSBAND AND WIFE—Married Women, Granting Power of Attorney.—A married woman, her husband joining therein, may make a valid power of attorney to convey her lands.—*Linton v. Moorehead*, Pa., 59 Atl. Rep. 264.

100. HUSBAND AND WIFE—Permanent Alimony—Where defendant's whole income was about \$3,600 per year, his wife, on a bill for support, was entitled to permanent alimony of one-third of such amount.—*Bennett v. Bennett*, N. J., 59 Atl. Rep. 245.

101. HUSBAND AND WIFE—Wife's Earnings.—Money earned by the wife belongs to the husband, in the absence of any agreement that it was to be hers.—*Monahan v. Monahan*, Vt., 59 Atl. Rep. 169.

102. INJUNCTION—Contempt, Pickets for Labor Union.—Pickets for a labor union held amenable to an injunction of which they have actual notice, although not made parties to the injunction suit.—*Anderson v. Indianapolis Drop Forging Co.*, Ind., 72 N. E. Rep. 277.

103. INJUNCTION—Right to Cut Ice.—A lessor of land adjacent to a mill pond, who had granted the lessee no right to cut ice from the pond, was entitled to an injunction to restrain the lessee from so doing.—*Olipphant v. Richman*, N. J., 59 Atl. Rep. 241.

104. INSANE PERSONS—Inquisition, Death of Party.—A cause of action to have defendant declared a lunatic

does not survive the death of defendant. — Posey v. Posey, Tenn., 83 S. W. Rep. 1.

105. **INTEREST**—Interest on Preference. — Commencement by trustee in bankruptcy of action to recover money alleged to have been paid as a preference by a bankrupt starts the running of interest.—Kauman v. Tredway, U. S. S. C. 25 Sup. Ct. Rep. 33.

106. **INTOXICATING LIQUORS**—Illegal Sale. — It is no defense to a seller of liquor without a license that the city or town did not vote license, or that there were no commissioners to whom application for license could be made.—State v. Scampini, Vt., 59 Atl. Rep. 201.

107. **INTOXICATING LIQUORS**—License, Remonstrance. — Under Burns' Ann. St. 1901, § 7283i, relative to remonstrances to the granting of liquor licenses, persons who have ceased to be voters in a ward cannot be counted in determining number of voters.—Abbott v. Inman, Ind., 72 N. E. Rep. 284.

108. **JUDGES**—Judge and Counsel Brothers in-Law. — Circuit Judge, who was brother in-law of plaintiff's counsel, held not disqualified, under Comp. Laws, § 1109, when agreement for contingent fee and attorney's lien was waived.—Knickerbocker v. Worthing, Mich., 101 N. W. Rep. 540.

109. **JUDGMENT**—Omission of Seal. — The omission of the seal of the court from a citation is ground only for a direct attack on a judgment, and in an action of debt on such judgment the objection is not available.—Newman v. Mackey, Tex., 83 S. W. Rep. 31.

110. **JUDGMENT**—Res Judicata. — The effect as *res judicata* of a decree in a case in which the validity of certain releases was in issue cannot be limited by oral testimony of trial judge that, in deciding the case, he did not consider the validity of the release.—Fayerweather v. Ritch, U. S. S. C., 25 Sup. Ct. Rep. 58.

111. **JUDGMENT**—Vacation After Term. — A judgment cannot be vacated after the term, except in obedience to the mandate of an appellate court on reversal.—Doremus v. City of Chicago, Ill., 72 N. E. Rep. 403.

112. **LANDLORD AND TENANT**—Nature of Tenancy. — Defaulting purchaser of property, remaining in possession, paying rent, held a tenant from month to month, and liable to be sued out without notice after 15 days' default, under Gen. Laws 1896, ch. 269, § 7.—McRillis v. Benoit, R. I., 59 Atl. Rep. 108.

113. **LANDLORD AND TENANT**—Rights of Cropper. — The lease of a farm construed, and held, that one who sowed wheat on the farm as a cropper had no right to plow up a portion thereof in the spring and plant the ground to another crop.—Stebbins v. Demorest, Mich., 101 N. W. Rep. 528.

114. **LIFE ESTATES**—Constructive Notice, Renunciation of Trust. — The recording of a deed by which a trustee acquired legal title to the trust property held to be constructive notice to the beneficiaries of a renunciation of the trust.—Commonwealth v. Clark, Ky., 83 S. W. Rep. 100.

115. **LIFE INSURANCE**—Payment of Premium. — It would be implied from certain provisions of an insurance policy that the annual premium might be paid in whole or in part by the promissory note of the assured or insured.—Ferguson v. Union Mut. Life Ins. Co., Mass., 72 N. E. Rep. 358.

116. **LIFE INSURANCE**—Solicitor, the Agent of Whom. — An insurance solicitor is the agent of the insurer, and not of the insured, notwithstanding a clause in the insurance contract declared him the insured's agent.—Reilly v. Empire Life Ins. Co., 90 N. Y. Supp. 866.

117. **LIMITATION OF ACTION**—Arrest of Judgment. — Where, on objection to the declaration after verdict, plaintiff elected to submit to an arrest of judgment, it did not preclude a new action for the same cause within a year, under V. S. 1214.—Baker v. Sherman, Vt., 59 Atl. Rep. 167.

118. **MANDAMUS**—Compliance with Mandate. — An order on remand of a cause, not being reviewable by appeal or

error and not being a compliance with the mandate, plaintiff held entitled to *mandamus*.—State v. Douglass, Mo., 83 S. W. Rep. 87.

119. **MANDAMUS**—Reinstatement of Suspended Clerk. — Where an employee is taken off from the suspended list, and a vacancy occurs, entitling him to reinstatement, it is not necessary for him to demand reinstatement before bringing *mandamus*.—Peoples v. Grout, 90 N. Y. Supp. 861.

120. **MASTER AND SERVANT**—Defective Appliances. — A railroad employee held bound not to expose himself to unusual danger, but entitled to rely on the presumption that the railroad would not furnish defective appliances.—Foster v. New York, N. H. & H. R. Co., Mass., 72 N. E. Rep. 331.

121. **MASTER AND SERVANT**—Duty of Master to Inspect Premises. — A master who hired the building in which his servants were employed held entitled to assume that appliances placed therein by the lessor were in proper condition.—Kirk v. Sturdy, Mass., 72 N. E. Rep. 349.

122. **MASTER AND SERVANT**—Employers' Liability Act, Superintendents. — One in charge of the work of loading a machine onto a wagon might be found by the jury to be a superintendent within the employer's liability act.—Cunningham v. Atlas Tack Co., Mass., 72 N. E. Rep. 325.

123. **MASTER AND SERVANT**—Fellow Servants, Railroads. — The act of sorting and discarding waste material from the coal by the fireman while firing the engines is work in connection with the operation of a railroad, within Gen. St. 1894, § 2701, making defendant liable for acts of fellow servants.—Swartz v. Great Northern Ry. Co., Minn., 101 N. W. Rep. 504.

124. **MASTER AND SERVANT**—Personal Injury, Negligence of Foreman. — A servant, injured by the sliding of a brow used in transferring freight, through the negligence of his foreman, held not to have assumed the risk of such injury as a matter of law.—Murphy v. New York, N. H. & H. R. Co., Mass., 72 N. E. Rep. 380.

125. **MASTER AND SERVANT**—Safe Place to Work. — A master owes his servant the duty of using due care to see that a floor, on which heavy weights are moved, is in proper repair.—Thompson v. American Writing Paper Co., Mass., 72 N. E. Rep. 343.

126. **MASTER AND SERVANT**—Switchman, Assumed Risk. — While the risks incident to the duties of a switchman are very great, they do not excuse him from that degree of care and caution which a reasonably prudent person should exercise commensurate to the danger.—Montgomery v. Chicago Great Western Ry. Co., Mo., 83 S. W. Rep. 66.

127. **MINES AND MINERALS**—Gas Contracts. — A contract for the sale of gas and the development of gas land construed, and held not to entitle the grantors to gas to be furnished from wells drilled on the premises in lieu of rentals.—Indiana Natural Gas & Oil Co. v. Leer, Ind., 72 N. E. Rep. 283.

128. **MINES AND MINERALS**—Eaches to Enforce Rights. — Delay of eight years after right to deed of interest in mining claim has accrued held to defeat a suit to enforce such right.—Patterson v. Hewitt, U. S. S. C., 25 Sup. Ct. Rep. 35.

129. **MONEY RECEIVED**—Improper Payment. — Where a bank made an invalid payment of a deposit to an administrator, who paid the same to defendant, plaintiff, who was rightfully entitled to the deposit could not recover the same from defendant in an action for money had and received.—Cole v. Bates, Mass., 72 N. E. Rep. 333.

130. **MONOPOLIES**—Validity of State Pilotage Laws. — No monopoly forbidden by the anti trust law held created by state regulations providing for the appointment of pilots, and restricting the right to pilot to those duly appointed.—Olsen v. Smith, U. S. S. C., 25 Sup. Ct. Rep. 52.

131. **MORTGAGES**—Consideration. — Simple agreement of parties to a mortgage without consideration that it shall no longer be of force held not a valid release.—Lynn v. Bean, Ala., 37 So. Rep. 515.

132. **MORTGAGES**—Transfer to Third Persons.—Convey-

ance of land to defendant by a third person, with an agreement by defendant to transfer to plaintiff under certain circumstances, held not a mortgage.—Conkey v. Rex, Ill., 72 N. E. Rep. 370.

133. MUNICIPAL CORPORATIONS—De Facto Policeman, Appointment.—A *de facto* police patrolman, whose name has been dropped from the pay roll, is not entitled to *mandamus* to compel the restoration of his name.—McNeill v. City of Chicago, Ill., 72 N. E. Rep. 450.

134. MUNICIPAL CORPORATIONS—Lighting Streets, Governmental Function.—The lighting of a city is a governmental function, for the failure to perform which the city is not liable to an injured pedestrian.—City of Vincennes v. Spees, Ind., 72 N. E. Rep. 531.

135. MUNICIPAL CORPORATIONS—Public Improvements, Re-Assessments.—The doctrine of *bona fide* purchasers cannot be invoked to prevent enforcement of lien of a reassessment for the local improvement by one who purchases after original attempt to assess had been declared void.—City of Seattle v. Kelleher, U. S. S. C., 25 Sup. Ct. Rep. 44.

136. MUNICIPAL CORPORATIONS—Street Improvements, Departure from Ordinance.—Certain deviations from a paving contract held not such departures from the ordinance as to render a supplemental ordinance invalid on the ground that the work was not that provided for.—City of Chicago v. Sherman, Ill., 72 N. E. Rep. 396.

137. MUNICIPAL CORPORATIONS—Transfer of Clerks.—Conduct of city comptroller in transferring expert accountants to position of disbursing clerks held a determination that the services of such disbursing clerks were necessary.—People v. Grout, 90 N. Y. Sup. 861.

138. NEGLIGENCE—Defective Streets.—A large stone placed at the edge of a sidewalk held a defect for which the city was liable to an injured pedestrian.—City of Vincennes v. Spees, Ind., 72 N. E. Rep. 531.

139. NEGLIGENCE—Injury to Licensee on Railroad Right of Way.—A railway company, permitting the public to use its right of way for a passage, held only bound to keep the way free from dangers.—Quants v. Southern Ry. Co., N. Car., 49 S. E. Rep. 79.

140. NEGLIGENCE—Intoxication.—Intoxication does not relieve a man from the degree of care required of a sober man in the same circumstances.—Vizacchero v. Rhode Island Co., R. I., 59 Atl. Rep. 105.

141. NEGLIGENCE—Riding With a Negligent Husband.—Negligence of plaintiff's husband, with whom she was riding at the time of her injury, held not imputable to her.—Indianapolis St. Ry Co. v. Johnson, Ind., 72 N. E. Rep. 571.

142. NEW TRIAL—Surprise, Amending.—In action for personal injuries resulting from the fall of a door, permitting amendment to the complaint at the trial charging general delapidation of the premises held to entitle defendant to a new trial.—Oats v. New York Dock Co., 90 N. Y. Supp. 878.

143. NUISANCE—Proximity of Proposed Cemetery.—The mere proximity of a proposed cemetery to residence property, and the consequent depreciation of its value, affords no right of action to restrain the establishment of the cemetery.—Elliott v. Ferguson, Tex., 83 S. W. Rep. 56.

144. PILOTS—State Regulation.—No inherent rights guaranteed by the federal constitution held infringed by state regulations providing for appointment of pilots and restricting pilots to those duly appointed.—Olsen v. Smith, U. S. S. C., 25 Sup. Ct. Rep. 52.

145. PLEDGES—Rights of Pledgee.—A pledgee held entitled to sue the pledgor for a debt, to file a bill to foreclose the pledge, or to sell the same without judicial process on notice to redeem.—White River Sav. Bank v. Capital Sav. Bank & Trust Co., Vt., 59 Atl. Rep. 197.

146. PRINCIPAL AND SURETY—Building Contracts.—A contractor's surety held not discharged by the owner's failure to insure as required by the contract, no loss having occurred which would have been covered by the insurance.—Hohn v. Shideler, Ind., 72 N. E. Rep. 575.

147. PRINCIPAL AND SURETY—Employee's Bond, Liability.—A surety on an employee's bond held liable for a misappropriation, though not discovered until after another bond had been given.—Hawlep v. United States Fidelity & Guaranty Co., 90 N. Y. Supp. 893.

148. PRISONS—Constable, Acting for State in Committing Prisoner.—A constable, committing a prisoner to the lockup, acts for the state, though he may have received his appointment from the town.—Mains v. Inhabitants of Ft. Fairfield, Me., 59 Atl. Rep. 87.

149. RAILROADS—Eminent Domain, Condemnation Proceedings.—When a mortgagee waives its right to be heard on the assessment of damages in proceedings relative to the abolition of grade crossings, the mortgagor is entitled to recover the damages.—Providence, F. R. & N. Steamboat Co. v. City of Fall River, Mass., 72 N. E. Rep. 388.

150. RAILROADS—Highway Crossing, Nuisance.—A railroad company held not liable for injuries at a highway crossing by plaintiff's horse taking fright at a standing freight car, on the ground that the crossing was a nuisance.—Hohman v. New York Cent. & H. R. R. Co., 90 N. Y. Supp. 882.

151. RAILROADS—Injunction, Restraining Action a Law.—Abutting owners held not to be enjoined from suing a railroad company for illegal change of street grade because the city contracted with the company to assume liability therefor.—United New Jersey R. & Canal Co. v. Lewis, N. J., 59 Atl. Rep. 227.

152. RAILROADS—Stop, Look and Listen.—A person slowly approaching a railroad track in a noiseless vehicle need not stop to look and listen.—Esler v. Wabash R. Co., Mo., 83 S. W. Rep. 73.

153. REFERENCE—Finality of Findings.—Where an auditor is appointed under the usual rule, and his report is merely evidence, and not final, the question of recommendation is one of discretion, and the decision of the trial court upon it is not open to exception.—Tripp v. Macomber, Mass., 72 N. E. Rep. 361.

154. RELIGIOUS SOCIETIES—Building Contracts, Want of Authority.—Church congregation held not liable for the value of lumber furnished to rebuild the church edifice, where the only contract on its part was made by its president, and he had no authority to make such contract.—East Baltimore Lumber Co. v. K'nessett Israel Anshe S'phard Congregation, Md., 59 Atl. Rep. 180.

155. REMOVAL OF CAUSES—Dismissal After Removal, New Suit Instituted.—A suit being removed to the federal court, plaintiff had the right to dismiss and subsequently sue in the state court, laying damages in less than \$2,000.—Pacific Exp. Co. v. Needham, Tex., 83 S. W. Rep. 22.

156. SALES—Acceptance of Property in Defective Condition.—Acceptance of property manufactured to order held not to preclude the buyer from setting off damages caused by defects in an action for the price.—Alabama Steel & Wire Co. v. Symons, Mo., 83 S. W. Rep. 78.

157. SCHOOLS AND SCHOOL DISTRICTS—Restraining Tax Levy.—The levy of a tax voted by a school district will not be restrained because the call for the election to authorize such tax was participated in by *de facto* trustees.—Boesch v. Hyrom, Tex., 83 S. W. Rep. 18.

158. STATUTES—Constitutional Requisites.—Under Const. § 64, it is necessary, in order that a vote of the house, adopting the report of the conference committee, operate a vote of concurrence in amendments proposed by the senate, that the report recommend concurrence in such amendments.—Board of Revenue of Jefferson County v. Crow, Ala., 37 So. Rep. 469.

159. STREET RAILROADS—Duty Towards Alighting Passengers.—Where a street car has stopped to permit passengers to alight, it is the duty of the conductor to know that the passengers have alighted before starting the car.—Union Traction Co. v. Siceloff, Ind., 72 N. E. Rep. 266.

160. STREET RAILROADS—Persons on Track, Stopping Car.—Operation of an electric car at a speed which pre-

vented its being stopped in time to avoid injury after discovering the danger of plaintiff's intestate held not negligent.—*Vizacchero v. Rhode Island Co.*, R. I., 59 Atl. Rep. 105.

161. SUBSCRIPTIONS—Intention of Parties.—Contract between street railroad company and property owner on the line held to require the road to be operated continuously for 25 years.—*Santa Fe St. Ry. Co. v. Schutz*, Tex., 83 S. W. Rep. 39.

162. TAXATION—Bill to Set Aside Tax Deed.—A bill to set aside certain tax deeds held demurrable for failure to point out the specific defects relied on, or to allege that the defects appeared on the face of the proceed ings.—*Glos v. Hanford*, Ill., 72 N. E. Rep. 439.

163. TAXATION—Federal Agencies.—The United States has no such interest in land conveyed for dry dock purposes, with reserved right to use the dock and for forfeiture, as will prevent state from taking the corporation's interest.—*Baltimore Shipbuilding & Dry Dock Co. v. City of Baltimore*, U. S. S. C., 25 Sup. Ct. Rep. 50.

164. TAXATION—Illegal Assessment.—A void and illegal assessment may be attacked at any time without the filing of preliminary objections.—*People v. Feitner*, 90 N. Y. Supp. 526.

165. TAXATION—Limitations.—The five year statute of limitations is applicable to proceedings for the assessment of lands which the owner has failed to assess for taxation.—*Falls Branch Jellico Land & Improvement Co. v. Commonwealth*, Ky., 83 S. W. Rep. 105.

166. TAXATION—Tax Sale, Rights of Owner During Redemption Period.—The legal title to land sold for taxes remains in the owner until the period of redemption has expired, and he may use the same and cut timber therefrom.—*Millard v. Breckwoldt*, 90 N. Y. Supp. 890.

167. TAXATION—Transfer Tax on Annuity.—Where transfer tax on annuity is paid out of the residuary estate, rule on which the amount is returned to the residuary estate defined.—*In re Tracy*, N. Y., 72 N. E. Rep. 519.

168. TAXATION—Valuation.—The valuation placed on the property of one appealing from assessment by the assessors in other years is inadmissible on the question of value.—*Penobscot Chemical Fibre Co. v. Inhabitants of Town of Bradley*, Me., 59 Atl. Rep. 83.

169. TRESPASS—Who May Maintain.—One rightfully in possession of land, whether having the legal title or not, may properly sue for a trespass thereon.—*Louisville & N. R. Co. v. Smith*, Ala., 37 So. Rep. 490.

170. TRESPASS TO TRY TITLE—Adverse Possession.—In trespass to try title, where there was evidence that plaintiff's agent had possession, though his home was located in a street outside the lines of the land, an instruction depriving plaintiff of the the benefit of such possession held erroneous.—*Travis v. Hall*, Tex., 83 S. W. Rep. 425.

171. TRIAL—Arguments of Counsel.—A defendant has no absolute right, by failing to argue a case to the jury, to preclude plaintiff from making a closing, as well as an opening argument.—*Conrad v. Cleveland*, C., C. & St. L. Ry. Co., Ind., 72 N. E. Rep. 489.

172. TRIAL—Excluding Admissible Evidence.—A judge, presiding at a jury trial, has no discretion to exclude admissible evidence, because in his opinion sufficient proof, if believed, has already been introduced to establish the fact to be proved.—*Perkins v. Rice*, Mass., 72 N. E. Rep. 323.

173. TRIAL—Injury to Trespassing Child, Instruction.—In an action for injuries to a child while trespassing in defendant's gin house, a requested instruction held not covered by one of the instructions given.—*North Texas Const. Co. v. Bostick*, Tex., 83 S. W. Rep. 12.

174. TRIAL—Instruction Embodying Theory of Case.—A requested charge affirmatively submitting defendant's theory of the case held required to be given, the main charge not having done so.—*Missouri, K. & T. Ry. Co. of Texas v. Renfro*, Tex., 83 S. W. Rep. 21.

175. TRIAL—Pleading.—Where a question is susceptible

of a competent answer, the remedy open to the opposing party, in case the answer actually made is incompetent, is by a motion to exclude it after it is made, and not by an objection to the question.—*Western Union Tel. Co. v. Bowman*, Ala., 37 So. Rep. 493.

176. TRIAL—Questions Imputing Want of Chastity.—Asking witness on cross-examination questions imputing to her a want of chastity, in the apparent belief that they are competent, is not reversible error.—*Knickerbocker v. Worthington*, Mich., 101 N. W. Rep. 540.

177. TRIAL—Special Interrogatories.—In an action against a city for injuries to a pedestrian, answer to special interrogatory held not to establish contributory negligence, in face of the general verdict.—*City of Vincennes v. Spees*, Ind., 72 N. E. Rep. 531.

178. TRUSTS—Laches to Enforce Rights.—Refusal of trustee to execute deed of interest in mining location under trust agreement held a repudiation of the trust, which opens the door to defense of laches and a suit to enforce it.—*Patterson v. Hewitt*, U. S. S. C., 25 Sup. Ct. Rep. 35.

179. TRUSTS—Trustee by Implication of Law.—Where an executor becomes a trustee by implication of law only, the revocation of his appointment as executor terminates his power to act as trustee, unless otherwise provided by the will.—*Mullanny v. Nangle*, Ill., 72 N. E. Rep. 885.

180. USE AND OCCUPATION—Contracts, Parent and Child.—Where a son cultivated the lands of his mother, receiving a portion of the crops, as between the son and estate of the mother, held error to charge him for the rental value of the lands, after the mother's death, without giving him an opportunity to show what taxes and charges he was entitled to have set off against the use of the land.—*Burwell v. Burwell*, Va., 49 S. E. Rep. 68.

181. VENDOR AND PURCHASER—Contract of Sale, Signature of Purchaser.—It is not necessary to the validity of a contract for the sale of land that it should be signed by the purchaser.—*Hyden v. Perkins*, Ky., 83 S. W. Rep. 128.

182. VENDOR AND PURCHASER—Presumption that Title is Marketable.—In the absence of a stipulation to the contrary, a marketable title is always presumed to be offered when the subject-matter of a proposed sale is real estate.—*Scudder v. Watt*, 90 N. Y. Supp. 605.

183. VENDOR AND PURCHASER—Restrictive Agreement.—Mortgagor held to have power to make a binding contract with other property owners that no intoxicating liquors should ever be manufactured or sold on their premises.—*Scudtner v. Watt*, 90 N. Y. Supp. 605.

184. WILLS—Construction.—Under a will devising a double house, held, that a forfeiture was not worked by charging by way of anticipation the income from one side it.—*Carlin v. Harris*, Md., 59 Atl. Rep. 122.

185. WILLS—Probate, Persons Aggrieved.—An heir at law and next of kin, not cited nor appearing in the contest in the orphans' court, is a person aggrieved by a decree admitting a will to probate, and may appeal.—*In re Young's Will*, N. J., 59 Atl. Rep. 154.

186. WITNESSES—Claim Against Decedent's Estate.—A claimant is incompetent to testify in his own favor to establish his claim against the estate of a deceased person.—*Jones v. Jones*, Miss., 37 So. Rep. 499.

187. WITNESSES—Competency of Nine-Year-Old Child.—A child nine years of age held to be a competent witness.—*Sokol v. People*, Ill., 72 N. E. Rep. 382.

188. WITNESSES—Divorced Wife.—Under the statute, a divorced wife cannot testify against her former husband as to communications made during coverture.—*German-American Ins. Co. v. Paul*, Ind. Ter., 82 S. W. Rep. 60.

189. WITNESSES—Transactions with Deceased Persons.—Under Code Civ. Proc., § 829, an executor, who has paid a claim, held incompetent to testify, on settlement of his accounts, as to conversations with testator's widow, since deceased, for whose support the claim was incurred.—*In re Goss*, 90 N. Y. Supp. 769.